No. [illegible]

Supreme Court
FILED
MAY [illegible]
JOHN T. FEY, Clerk

Court of Appeals

State of New York

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, and ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

CITY OF NEW YORK; ROBERT F. WAGNER as Mayor of the City of New York and a member of the Board of Estimate; LAWRENCE E. GEROSA as Comptroller of the City of New York and a member of the Board of Estimate; ABE STARK as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES A. LUNDY as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES as Chairman of the Committee on Slum Clearance of the City of New York,

Defendants-Respondents,

FORDHAM UNIVERSITY, LINCOLN CENTER FOR THE PERFORMING ARTS, INC., and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Defendants-Intervenors-Respondents.

RECORD ON APPEAL

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New York Supreme Court

Appellate Division—First Department

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, and ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

CITY OF NEW YORK; ROBERT F. WAGNER as Mayor of the City of New York and a member of the Board of Estimate; LAWRENCE E. GEROSA as Comptroller of the City of New York and a member of the Board of Estimate; ABE STARK as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES A. LUNDY as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES as Chairman of the Committee on Slum Clearance of the City of New York,

Defendants-Respondents,

FORDHAM UNIVERSITY, LINCOLN CENTER FOR THE PERFORMING ARTS, INC., and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Defendants-Intervenors-Respondents.

Statement Under Rule 234

This is an appeal by the plaintiffs from the order of the Hon. Mr. Justice Owen McGivern made at Special Term, Part III of the Supreme Court, New York County, the 30th day of December, 1957 granting the motions of defendants and defendants-intervenors for summary judgment dismissing the complaint herein, dismissing the complaint and directing the entry of judgment of dismissal without costs, and further denying the plaintiffs' motion for a temporary injunction and cross-motion for summary judgment on the complaint herein.

This action was commenced by the service of the summons and complaint upon the defendants on the 2nd day of December, 1957. Issue was joined by the service of the answer of the defendants on the 9th day of December, 1957.

By separate orders, respectively dated December 9, 1957 and December 12, 1957, all parties consenting thereto, defendants-intervenors Fordham University, Lincoln Center for the Performing Arts, Inc., and Webb & Knapp Lincoln Square Corporation were permitted to intervene in the action and to serve answers to the complaint, said answers being respectively served December 9, 1957, December 12, 1957 and December 20, 1957. The answer of defendant-intervenor Webb &
5 Knapp Lincoln Square Corporation was not considered by the court on the aforementioned motions.

The plaintiffs moved, by Order to Show Cause dated November 29, 1957, for a temporary injunction restraining the defendants from acquiring the Lincoln Square area by condemnation or otherwise. The defendants by Notice of Motion dated December 9, 1957 moved pursuant to subdivision 4 of Rule 106, and Rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint, judgment on the pleadings and summary judgment. The defendant-intervenor Ford-
6 ham University, by Notice of Motion dated December 10, 1957, also moved pursuant to section 476 of the Civil Practice Act and Rules 112 and 113 of the Rules of Civil Practice, for dismissal of the complaint and summary judgment. The defendant-intervenor Lincoln Center for the Performing Arts, Inc. joined in both the foregoing motions. The plaintiffs, by Notice of Motion dated December 10, 1957, cross-moved pursuant to Rule 113 of the Rules of Civil Practice for summary judgment.

There have been no changes in parties or attorneys since the commencement of the action except for the addition of the defendant-intervenors.

Notice of Appeal to this Court was served on December 31, 1957. Judgment was entered upon the aforementioned order on January 2, 1958.

There have been no further changes in the parties or attorneys than as aforesaid.

The appeal from the Order of Mr. Justice McGivern, and the judgment entered thereon, was heard by the Appellate Division of the Supreme Court, First Department, on the 13th day of February, 1958, and by its Order, dated the 20th day of February, 1958, the said Appellate Division affirmed the decision of the lower court, without opinion.

Notice of appeal to this Court was served on February 21, 1958, and filed in the office of the Clerk of the County of New York on the same date.

7

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

64TH ST. RESIDENCES, INC., *et al.*,

Plaintiffs,

against

8

THE CITY OF NEW YORK, *et al.*,

Defendants.

Sir:

PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the Appellate Division of the Supreme Court, First Judicial Department, from an order entered in the above entitled action in the Office of the Clerk of the County of New York on the 9
30th day of December, 1957, granting the defendants' motion for summary judgment, denying plaintiffs' motion for a temporary injunction pendente lite, denying plaintiffs' motion for summary judgment for declaratory relief, and from each and every part of said order.

December 31, 1957

Yours, etc.,

HARRIS L. PRESENT, Esq.
Attorney for Plaintiffs-Appellants,
Office & P. O. Address,
1270 6th Avenue
New York, New York

To:

THE CLERK OF THE COUNTY OF
NEW YORK

11

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Respondent Fordham University
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12

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Respondent, Lincoln Center for the
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ROSENMAN, GOLDMARK, COLIN & KAYE, Esqs.
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Respondent Webb & Knapp Lincoln
Square Corporation,
575 Madison Avenue
New York, New York

Order Appealed From

At a Special Term, Part III of the Supreme Court, State of New York, held in and for the County of New York, at the Courthouse, Foley Square, in the Borough of Manhattan, City and County of New York on the 30th day of December, 1957.

Present:

HON. OWEN MCGIVERN,
Justice.

[SAME TITLE]

Plaintiffs herein having moved for a temporary injunction restraining the defendants from acquiring the Lincoln Square area by condemnation or otherwise, from executing and carrying out the terms of a proposed sponsorship contract with defendant-intervenor, Fordham University, from further processing the project with the Federal Urban Renewal Administration and from expending or committing any city funds in connection with the project, and

Defendants herein having moved pursuant to Rule 106, subd. 4 and Rules 112 and 113 of the Rules of Civil Practice for an order and judgment (a) dismissing the complaint on the ground that it is insufficient in law and does not state facts sufficient to constitute a cause of action; (b) on the pleadings and (c) dismissing the com-

16 *Order Appealed From*

plaint and granting summary judgment in favor of the defendants and

Plaintiffs herein having cross-moved pursuant to Rule 113 of the Rules of Civil Practice for summary judgment in favor of the plaintiffs on their causes of action for declaratory judgments, and

Defendant-intervenor, Fordham University having moved for an order granting judgment on the pleadings pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, dismissing the complaint on the ground
17 that it does not state facts sufficient to constitute a cause of action, and for an order granting summary judgment pursuant to Rule 113 of the Rules of Civil Practice, and

Defendant-intervenor Lincoln Center for the Performing Arts, Inc., having joined in the motions of the defendants to dismiss the complaint and in opposition to plaintiffs' cross-motion for summary judgment,

And said motions having regularly come on to be heard before me,

18 Now, on reading and filing the complaint herein, verified the 27th day of November, 1957, together with the exhibits annexed thereto and the answer of defendants, verified the 9th day of December, 1957, together with the exhibits annexed thereto, and the answer of defendant-intervenor Fordham University, verified the 9th day of December, 1957, together with the exhibits annexed thereto, and the answer of defendant-intervenor Lincoln Center for the Performing Arts, Inc., verified the 12th day of December, 1957, and plaintiffs' order to show cause, dated November 29, 1957, and the defendants' notice of motion dated December 9, 1957 and plaintiffs' notice of cross-motion dated

December 10, 1957 and the notice of motion of defendant-intervenor Fordham University, dated December 10, 1957, and

The affidavit of Sidney Dickstein, sworn to November 27, 1957, together with the exhibits annexed thereto, and the affidavit of Sidney Dickstein, sworn to December 12, 1957, together with the exhibits annexed thereto, submitted in support of plaintiffs' motion for a temporary injunction and cross-motion for summary judgment and in opposition to the motions of defendants and defendants-intervenors, and the affidavit of Robert Moses, sworn to the 4th day of December, 1957, together with the exhibits annexed thereto, and the affidavit of Robert Moses, sworn to the 9th day of December, 1957, together with the exhibits annexed thereto, and the affidavit of Leo A. Larkin, sworn to the 18th day of December 1957, together with the exhibits annexed thereto, and the affidavit of Laurence J. McGinley, sworn to the 10th day of December, 1957, and the affidavit of Edgar B. Young, sworn to the 12th day of December, 1957, together with the exhibit annexed thereto, in support of the motions of defendants and defendants-intervenors and in opposition to the motion and cross-motion of the plaintiffs,

And after hearing Harris L. Present, Esq., attorney for the plaintiffs in support of plaintiffs' motion for a temporary injunction and cross-motion for summary judgment and in opposition to the motions of defendants and defendants-intervenors for judgment dismissing the complaint, and Hon. Peter Campbell Brown, Corporation Counsel of the City of New York, attorney for defendants, by Anthony Curreri, Esq., of counsel, and Saxe, Bacon and O'Shea, Esqs., attorneys for defendant-intervenor Fordham Uni-

versity, by Edward D. Burns, Esq. and Porter R. Chandler, Esq., of counsel, and Sanford L. Schamus, Esq., attorney for West Side Chamber of Commerce of the City of New York, Inc., *amicus curiae,* in support of the motions of defendants and defendants-intervenors and in opposition to plaintiffs' motion and cross-motion,

And due deliberation having been had, upon filing the opinion of the Court, it is

23 ORDERED, that the motions of defendants and defendants-intervenors for summary judgment dismissing the complaint be and the same are hereby granted and it is further

ORDERED, that the complaint be and the same is hereby dismissed and the Clerk is hereby directed to enter judgment accordingly without costs, and it is further

ORDERED, that plaintiffs' motion for a temporary injunction and cross-motion for summary judgment be and the same are hereby denied.

24

Enter,

O. McG.,
J. S. C.

Filed Dec. 30, 1957

N. Y. Co. Clerk's Office

Judgment Appealed From

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

The defendants having moved pursuant to Rule 106, subd. 4, and Rules 112 and 113 of the Rules of Civil Practice for an order dismissing the complaint; and the defendant-intervenor, Fordham University, having moved pursuant to Section 476 of the Civil Practice Act and Rules 112 and 113 of the Rules of Civil Practice for an order granting judgment on the pleadings and dismissing the complaint; and the defendant-intervenor, Lincoln Center for the Performing Arts, Inc., having joined in the aforesaid motions; and an order having been duly entered in the office of the Clerk of the County of New York on or about the 30th day of December, 1957, granting the motions and dismissing the complaint, without costs,

26

27

Now, on motion of Peter Campbell Brown, Corporation Counsel, attorney for defendants; Saxe, Bacon and O'Shea, Esqs., attorneys for defendant-intervenor, Fordham University; and Milbank, Tweed, Hope and Hadley, Esqs., attorneys for defendant-intervenor, Lincoln Center for the Performing Arts, Inc.; and Rosenman, Goldmark, Colin & Kaye, attorneys for defendant-intervenor Webb & Knapp, Lincoln Square Corporation, it is

ADJUDGED that the complaint be and the same hereby is dismissed.

Dated: January 2, 1958.

HYMAN W. GAMSO,
Acting Clerk.

Filed January 2, 1958.

28

Complaint

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

Plaintiffs, by Harris L. Present, their attorney,
29 allege as follows:

For a First, Separate and Distinct Cause of Action on Behalf of Plaintiffs 64th St. Residences, Inc. and 89 Amsterdam Avenue Corporation, Suing Under Section 51 of the General Municipal Law

First: At all times herein mentioned plaintiffs 64th St. Residences, Inc. and 89 Amsterdam Avenue Corporation were and still are corporations incorporated under and pursuant to the laws of
30 the State of New York and have had their principal offices in the City, County and State of New York. For several years prior to the commencement of this action said plaintiffs have been and presently are the owners of and in possession of real property in said City of New York known as 146 West 64th Street and 89 Amsterdam Avenue, respectively, both in the City, County and State of New York, the record title of which at all times was and is in said plaintiffs' names. Said parcels of real property have been assessed and are now assessed in amounts in excess of $1000, and said plaintiffs have been and now are liable on such

assessments for payment of taxes to the said City of New York and have paid such taxes within one year prior to the commencement of this action. 31

Second: Upon information and belief and at all the times hereinafter mentioned, the above-named Robert F. Wagner was and still is the Mayor of the City of New York and a member of the Board of Estimate of the City of New York; the above-named Lawrence E. Gerosa was and still is the Comptroller of the City of New York and a member of the Board of Estimate; the above-named Abe Stark, Hulan E. Jack, James J. Lyons, John Cashmore, James A. Lundy and Albert V. Maniscalco were and still are members of said Board of Estimate; the above-named Robert Moses was and still is Chairman of the Committee on Slum Clearance of the City of New York; the above-named City of New York was and still is a municipal corporation existing under and subject to the Constitution and laws of the State of New York; the Board of Estimate was and still is the governing body of said City of New York. 32 33

Third: Under and pursuant to the provisions of Section 72-k of the General Municipal Law, the Board of Estimate of the City of New York is authorized to acquire, by condemnation or otherwise, any real property necessary or incidental to the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and unsanitary areas upon the prior consent of the City Planning Commission, and said Board of Estimate may apply for and accept financial assistance, loans and grants from the Federal Gov-

ernment as provided in Title I of the Federal Housing Act of 1949 as amended, 49 U. S. C. § 1451, *et seq.*

Fourth: Prior hereto and on information and belief, defendant Robert Moses as Chairman of the Committee on Slum Clearance of the City of New York requested and obtained authorization from the Board of Estimate of the City of New York to file application for an advance for funds for preparation and study of the Lincoln Square
35 Urban Renewal Project, Borough of Manhattan, City of New York, under the provisions of Title I of the Federal Housing Act of 1949 as amended, 42 U. S. C. § 1451 *et seq.* and Section 72-k of the General Municipal Law (hereinafter referred to as the "Project"); and defendant Moses thereafter requested and obtained authorization from said Board of Estimate to present and process the Project plan with the Federal Urban Renewal Administration.

Fifth: On information and belief, the Project
36 plan created pursuant to such authorization calls for the acquisition by the defendant City of New York, by condemnation or otherwise, of a thirteen square block area located in the Borough of Manhattan, City and State of New York, generally bounded on the north by West 70th Street and West 66th Street, on the south by West 66th Street and West 60th Street, on the east by Amsterdam Avenue and Columbus Avenue, on the west by the New York Central Railroad right of way and by Amsterdam Avenue (hereinafter referred to as the "Project Area"). The plan for said Project and the statutes referred to in Paragraph "Fourth" require the difference between the acquisition cost of the Project area, together with

site improvements, and the price obtained on resale of said area to be paid from a grant from the Federal Government of approximately 28 million dollars of Federal funds and a grant from the City of New York of approximately 14 million dollars of municipal funds.

Sixth: On information and belief, the Project plan includes a provision for a site of approximately 320,230 square feet, comprising the area generally bounded by Amsterdam Avenue, West 62nd Street, Columbus Avenue, and West 60th 38
Street (hereinafter referred to as the "collegiate site") for the Fordham University Downtown Center, which comprises the Schools of Law, Education, Business and Social Service; a provision for a site for a Performing Arts Center; and a provision for a housing site.

Seventh: On information and belief, the Project plan requires that prospective purchasers be designated as sponsors for each site in the Project area; that each sponsor enter into an agreement with the defendant City of New York pursuant to which it agrees to bid a minimum price at the 39
public auction of said site, and upon purchase of said site to use it for the specific purpose set forth in the Project plan, and the defendant City of New York agrees, upon approval of the Project and authorization of the Board of Estimate, to acquire said site by condemnation or otherwise, and to sell said site to the sponsor at public auction, unless a higher bid is made by another to purchase the site for the use permitted by the plan.

Eighth: On information and belief, defendant Robert Moses has announced that the agreements

described in Paragraph "Seventh" above (hereinafter referred to as "sponsorship agreements") are essential to the Project because it would not be feasible for the City of New York to acquire the Project area unless commitments to purchase said area had previously been obtained.

Ninth: On information and belief, on or about October 1955, defendant Robert Moses, as Chairman of the Committee on Slum Clearance of the City of New York, solicited bids for the sponsor-
41 ship of the Project area.

Tenth: On information and belief, that defendant Moses as Chairman of the Committee on Slum Clearance of the City of New York thereafter accepted a sponsorship bid submitted by Fordham University to purchase the collegiate site for a price of $5 per square foot and designated Fordham as sponsor for said site, and restricted said site in the Project plan for redevelopment for educational purposes; and entered into a tentative sponsorship agreement with Fordham University
42 on behalf of the City of New York.

Eleventh: Thereafter, defendants Moses and City of New York revised said tentative sponsorship agreement, by changing the minimum price Fordham University was required to bid from $5 per square foot to approximately $8 per square foot and thereafter by changing said price from $8 per square foot to $6.75 per square foot and thereafter by changing said price from $6.75 per square foot to $7 per square foot.

Twelfth: On information and belief, Fordham University is a Catholic school under the control

and direction of the Catholic Church and, while enrollment is not limited to students of the Catholic faith, a complete program of religious education and indoctrination in the Catholic faith is conducted by the said University.

Thirteenth: On information and belief, that defendant Moses as Chairman of the Committee on Slum Clearance of the City of New York has announced that the solicitation of sponsorship bids for the sites in the Project area was widely advertised. On information and belief, that no 44
educational institution other than Fordham submitted a bid for the collegiate site; that there is no institution which presently intends and has funds available to purchase 320,230 square feet in the Borough of Manhattan at a price of $7 per square foot for the use required by the Project plan; that if the collegiate site is acquired by the City of New York and sold at public auction in accordance with the plan, Fordham University is the only possible bidder and defendant City of New York will be obligated to sell the collegiate site to Fordham University pursuant to the spon- 45
sorship agreement.

Fourteenth: On information and belief, the collegiate site has a value of, and will be acquired by the City pursuant to the Project plan at a price of more than $16 per square foot.

Fifteenth: On information and belief, sale of the collegiate site to Fordham University for the price of $7 per square foot after acquisition of said site for a price of more than $16 per square foot, and construction of various site improvements such as utilities by defendant City of New

York will result in a direct subsidy to Fordham University in a sum in excess of $3,500,000; sale of the collegiate site to Fordham University at any price below the acquisition cost and the cost of site improvements by defendant City of New York will result in a direct subsidy to Fordham University; sale of the collegiate site to Fordham University by defendant City of New York at any price will result in an indirect subsidy to Fordham University in that said University will be aided by the condemnation power of defendant
47 City of New York to acquire valuable property which it could not otherwise acquire.

Sixteenth: On information and belief, that defendant Moses, as Chairman of the Committee on Slum Clearance of the City of New York, after approval of the Project plan by the Housing and Home Finance Agency of the federal government, in or about August 1957, submitted the Project plan, including the sponsorship of the collegiate site by Fordham Unversity to the City Planning Commission for its approval; that thereafter on or
48 about September 10, 1957, the City Planning Commission held public hearings on the Project plan, at which hearings members of the public objected to said Project plan on the ground that it was illegal and unauthorized in that it required the use of public money, credit and property in aid of a school under the control and direction of a religious denomination; that thereafter, on or about October 2, 1957, the City Planning Commission approved the Project plan in its entirety and as a single entity.

Seventeenth: On information and belief, on or about October 25, 1957, the defendants, members of the Board of Estimate, held public hearings on

the Project plan, at which members of the public objected to said Project plan on the ground that it was illegal and unauthorized in that it required the use of public money, credit and property in aid of a school under the control and direction of a religious denomination; that thereafter the defendants, members of the Board of Estimate, approved the Project plan as an entity and authorized the City of New York to proceed with said Project and to acquire, by condemnation or otherwise, the Project area for sale, clearance and redevelopment, in accordance with the Project plan, 50
and specifically approved the sponsorship contract with Fordham University.

Eighteenth: The actions of defendants as hereinbefore alleged are null, void, illegal and unauthorized, as they are in violation of Article XI, Section 4 of the Constitution of the State of New York and in further violation of the Fourteenth Amendment of the Constitution of the United States.

Nineteenth: The condemnation, as approved and authorized by the Board of Estimate as afore- 51
said, is the taking of private property for a non-public use and is in violation of Article I, Section 7 of the Constitution of the State of New York and in further violation of the Fourteenth Amendment of the Constitution of the United States.

Twentieth: Unless defendants are restrained and enjoined from carrying out the Project plan, the defendant City of New York will condemn or otherwise acquire the Project site, and offer said site for sale at public auction at which Fordham will acquire the collegiate site thereby causing grave, irreparable injury to the taxpayers of the

City of New York and each of them, unwarranted waste and expenditure of public funds, and an injury to public property and the taxpayers of the City of New York, for all of which they have no adequate remedy at law.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION ON BEHALF OF PLAINTIFFS ROSE K. HARRIS, EDYTHE R. SHERRICK AND RENEE BOURET, SUING ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, AND UNITED BALL BEARING
53 CO., INC. AND SEYMOUR DAMBROT AND PHILIP DERMAN, AS CO-PARTNERS DOING BUSINESS IN THE NAME AND STYLE OF DAMBROT & DERMAN, SUING ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED.

Twenty-first: At all times herein mentioned plaintiffs Rose K. Harris, Edythe R. Sherrick and Renee Bouret were and still are citizens of the State of New York, residing at 101 West 60th Street in the Borough of Manhattan, City and State of New York. Said plaintiffs bring this
54 action on behalf of themselves and all others similarly situated.

Twenty-second: At all times herein mentioned plaintiff United Ball Bearing Co., Inc., was and still is a corporation incorporated under and pursuant to the laws of the State of New York, and has its principal offices, occupies business premises and is doing business at 49 Amsterdam Avenue, in the City, County and State of New York. At all times herein mentioned plaintiffs Seymour Dambrot and Philip Derman, doing business as co-partners in the name and style of Dambrot & Derman, occupied business premises and were

doing business at 40 Columbus Avenue, in the City, County and State of New York. Said plaintiffs have during the period of their occupancy of said business premises built up valuable good will for said businesses amongst the residents of the neighborhood and others and have made valuable installations of fixtures and equipment in the said premises. Said plaintiffs bring this action on behalf of themselves and all others similarly situated.

Twenty-third: Plaintiffs repeat, reaffirm and 56
reallege each and every allegation set forth in Paragraphs numbered "Second" through "Sixth" of this complaint as though fully set forth herein at length.

Twenty-fourth: The collegiate site includes 101 West 60th Street, Borough of Manhattan, City and State of New York, where plaintiffs Harris, Sherrick and Bouret now lawfully reside with members of their respective families.

Twenty-fifth: Plaintiffs repeat, reaffirm and reallege each and every allegation set forth 57
in Paragraphs numbered "Seventh" through "Twentieth" of this complaint as though fully set forth herein at length.

Twenty-sixth: Defendants, members of the Board of Estimate, have approved the Project plan and have authorized the acquisition by condemnation and otherwise of the collegiate site and the destruction of all residential and business structures within said site including numbers 101 West 60th Street, 49 Amsterdam Avenue and 40 Columbus Avenue, where plaintiffs lawfully reside or occupy business premises.

Twenty-seventh: Unless defendants are restrained and enjoined from acquiring by condemnation or otherwise the Project area, including the premises in which plaintiffs Harris, Sherrick and Bouret now reside, said plaintiffs will suffer grave and irreparable injury and, together with their respective families, will be forced to vacate their homes and premises, to their irremediable damage, for which they have no adequate remedy at law.

59 Twenty-eighth: Unless defendants are restrained and enjoined from acquiring by condemnation or otherwise the Project area, which includes the premises which plaintiffs United Ball Bearing Co., Inc. and Dambrot & Derman now occupy for their respective businesses, said plaintiffs will suffer grave and irreparable injury in that they will be forced to vacate said premises and to move from said neighborhood, thus losing the valuable good will of their respective businesses, the value of fixtures and installations, and will further incur substantial moving expenses,
60 to their irremediable damage, for which they have no adequate remedy at law.

WHEREFORE, plaintiffs 64th St. Residences, Inc. and 89 Amsterdam Avenue Corporation pray for judgment on the first cause of action as follows:

1. That the action of the Board of Estimate of the City of New York of November 26, 1957, approving the Project plan, the Project redevelopment contracts, the capital grant contract, acquisition of the Project area by condemnation or otherwise, and the sale of the Project area in accordance with the Project plan, be declared

null and void, illegal and unauthorized, in violation of Article XI, Section 4, and Article I, Section 7 of the Constitution of the State of New York and further in violation of the Fourteenth Amendment to the Constitution of the United States;

2. That defendants, their attorneys, agents, servants, representatives and/or employees now or hereafter connected with the subject matter of this complaint, be restrained and enjoined from (a) executing or carrying out the terms of the 62
sponsorship and redevelopment contracts with Fordham University; (b) acquiring by condemnation or otherwise the Project area; (c) further processing the Lincoln Square Urban Renewal Project with the Federal Urban Renewal Administration under Title I of the Federal Housing Act of 1949, as amended; (d) expending or continuing to expend, pledge or commit, directly or indirectly, any funds of the City of New York in connection with the Lincoln Square Urban Renewal Project.

63
Plaintiffs Rose K. Harris, Edythe R. Sherrick, Renee Bouret, United Ball Bearing Co., Inc., Seymour Dambrot and Philip Derman pray for judgment on the second cause of action as follows:

1. That the action of the Board of Estimate of the City of New York of November 26, 1957, approving the Project plan, the Project redevelopment contracts, the capital grant contract, acquisition of the Project area by condemnation or otherwise, and the sale of the Project area in accordance with the Project plan, be declared

null and void, illegal and unauthorized, in violation of Article XI, Section 4 and Article I, Section 7 of the Constitution of the State of New York and further in violation of the Fourteenth Amendment to the Constitution of the United States;

2. That defendants, their attorneys, agents, servants, representatives and/or employees now or hereafter connected with the subject matter of this complaint, be restrained and enjoined from (a) executing or carrying out the terms of the
65 sponsorship and redevelopment contract with Fordham University; (b) acquiring by condemnation or otherwise the Project area; (c) further processing the Lincoln Square Urban Renewal Project with the Federal Urban Renewal Administration under Title I of the Federal Housing Act of 1949, as amended; (d) expending or continuing to expend, pledge or commit, directly or indirectly, any funds of the City of New York in connection with the Lincoln Square Urban Renewal Project.

The plaintiffs individually and severally pray
66 for such other and further relief which to this Court seems just and proper in the premises, including the costs and disbursements of this action.

Harris L. Present,
Attorney for Plaintiffs,
Office and P. O. Address,
1270 Sixth Avenue,
New York 20, N. Y.

(Verified.)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Upon the summons and complaint herein, verified the 27th day of November, 1957, and the affidavit of Sidney Dickstein, verified the 27th day of November, 1957, let the defendants or their 68
attorneys show cause before this Court at a Special Term, Part III thereof, to be held in and for the County of New York in the County Courthouse in the Borough of Manhattan, City of New York, on the 5th day of December, 1957, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why a preliminary injunction should not issue herein enjoining the defendants, pending the determination of this action, from executing or carrying out the terms of the Lincoln Square Title I Urban Redevelopment Project sponsorship contract with Fordham University; acquiring by condemnation or otherwise 69
the Project area or any part thereof; further processing the said Project with the Federal Urban Renewal Administration; and expending or continuing to expend, pledge or commit, directly or indirectly, any funds of the City of New York in connection with the said Project.

ORDERED that personal service of this order to show cause, together with a copy of the papers hereto attached, on the defendants on or before the 2nd day of December, 1957, at 4:00 o'clock in the afternoon be deemed sufficient service.

Dated: November 29, 1957.

MATTHEW M. LEVY,
Justice of the Supreme Court
of the State of New York.

70 **Affidavit of Sidney Dickstein, Read in Support of Plaintiffs' Motions and in Opposition to Defendants' and Defendants-Intervenors' Motions**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

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71 STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SIDNEY DICKSTEIN, being duly sworn, deposes and says:

I am an attorney associated with Harris L. Present, attorney for the plaintiffs herein, and make this affidavit in support of the plaintiffs' motion for a temporary injunction and application for a stay pending the hearing and determination of plaintiffs' motion for temporary injunction.

72 I am fully familiar with the instant proceedings as well as the facts relating thereto, such facts being principally obtainable through public records or information available to the public at large.

The plaintiff 64th St. Residences, Inc. is the owner of real property located at 146 West 64th Street in the Borough of Manhattan, City and State of New York, which property is assessed in an amount exceeding $1,000.

The plaintiff 89 Amsterdam Avenue, Inc. is the owner of real property located at 89 Amsterdam Avenue in the Borough of Manhattan, City and State of New York, which property is assessed in an amount exceeding $1,000.

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Plaintiffs Harris, Sherrick and Bouret are residential tenants of an apartment building located at 101 West 60th Street in the Borough of Manhattan, City and State of New York.

Plaintiff United Ball Bearing Co., Inc. is a business tenant at 49 Amsterdam Avenue in the Borough of Manhattan, City and State of New York.

Plaintiffs Dambrot and Derman are business tenants at 40 Columbus Avenue in the Borough of Manhattan, City and State of New York.

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On November 26, 1957, the Board of Estimate passed a series of resolutions authorizing land acquisition, approving sponsorship contracts and authorizing the City of New York to enter into a capital grant contract with the Federal Urban Renewal Administration. Thus final action has been taken on the Lincoln Square Urban Renewal Project. A copy of the pertinent portion of the calendar of the Board of Estimate for November 26, 1957 is annexed hereto as "Exhibit A" and made a part hereof as though fully set forth herein.

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The gravamen of the complaint is based on the sponsorship by Fordham University of a portion of the redevelopment plan for Lincoln Square. Plaintiffs contend that such sponsorship gives aid, support and subsidy to a religious educational institution in violation of the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment, and Article 11, Section 4, of the Constitution of the State of New York. Plaintiffs further contend that they are immediately threatened with a taking of property rights without due process of law, in that such taking is not for public use in further violation of the Four-

teenth Amendment to the Constitution of the United States and Article 1, Section 7 of the Constitution of the State of New York.

Fordham University is a Catholic school sponsored, administered by, and dedicated to the Catholic Church and while enrollment is not limited to students of Catholic faith, Fordham conducts a complete program of religious education and indoctrination in the Catholic faith. The language of the prospectus of the School of
77 Education, one of the specific schools which is to occupy the site, states: "The role of the Church in education is presented in the proper light in all instruction at the undergraduate and graduate levels. The emphasis is distinctly and repeatedly Christian. The approach is partly historical but mainly philosophical. The theological implications are also given due consideration. The purpose of such emphasis is to serve the interests of the Church through providing, in its proper perspective, the energizing and stabilizing influence of Christian principles in the field of education."

78 The Lincoln Square Urban Renewal Project is being carried on pursuant to the provisions of Title I of the Federal Housing Act of 1949, as amended, 42 U. S. C. § 1450 *et seq.* and § 72-k of the General Municipal Law of the State of New York.

Title I of the National Housing Act of 1949 provides that federal funds shall be granted to local authorities for the purpose of acquiring slum areas and redeveloping such areas in accordance with a plan approved by local authorities and the Administrator of the Federal Urban Renewal Agency.

Section 72-K of the General Municipal Law permits and authorizes a municipal corporation to acquire real property for clearance and redevelopment, to provide local grants for the costs of acquisition and clearance and to apply for the Federal contributions provided by Title I of the National Housing Act of 1949, as amended.

The redevelopment plan is normally undertaken by private interests who acquire land from the local authorities at a price less than the total cost of acquisition. The loss incurred by reason of the difference between the cost of acquisition 80 and the amount obtained on resale, together with other expenses incurred in connection with the project, is borne two-thirds by the Federal Government and one-third by the local authority.

The Lincoln Square Urban Renewal Plan generally provides for the clearance and redevelopment of a thirteen-block area, comprising approximately sixty-eight acres, on the West Side of Manhattan, just above Columbus Circle. The renewal plan consists of the following major sections:

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1. A housing section on the blocks between Amsterdam Avenue and the New York Central Railroad tracks West of West End Avenue, from West 66th Street to West 70th Street.

2. A performing arts center on the blocks between Amsterdam and Columbus Avenues from West 62nd Street to West 65th Street.

3. A collegiate center on the blocks between Columbus and Amsterdam Avenues, from West 60th to West 62nd Streets.

82 *Affidavit of Sidney Dickstein*

4. An institutional area on the west side of Amsterdam Avenue between 66th Street and 67th Street.

The Lincoln Square Urban Renewal Project began its official processing on April 19, 1954 when the Committee on Slum Clearance filed a report with the Board of Estimate requesting authorization to file an application for federal funds for a study of Lincoln Square. On June 24, 1954, the Board granted such authorization. On Octo-
83 ber 27, 1954, the Committee on Slum Clearance requested the Board of Estimate to reapprove the prior grant of authority and this was done on October 29, 1954. On May 26, 1955, the Board of Estimate accepted the grant of federal planning funds. On January 17, 1956, the Committee on Slum Clearance requested the Board of Estimate to authorize an application for additional federal funds, and such authorization was granted on January 26, 1956. On or about June 7, 1956, the Committee on Slum Clearance sent preliminary plans to Mayor Wagner and requested that the
84 Mayor place on the calendar of the Board of Estimate a proposal to grant the Committee authorization to further process these plans with the Federal Urban Renewal Administration. On June 15, 1956, this proposal appeared on the Board's calendar and was referred to the City Planning Commission and the Corporation Counsel's Office for their reports. On June 29, 1956, the City Planning Commission approved these plans and recommended to the Board that the Board grant the requested authorization. On July 26, 1956, the Board held a public hearing on the requested authorization and adjourned the matter to August 30, 1956. On August 30, 1956, after

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further hearings were held, hearings were declared closed and the matter was placed on the Board's calendar for September 27, 1956. On September 27, 1956, the Board approved the request and authorized the Committee on Slum Clearance to further process the proposed plan with the Federal Urban Renewal Administration The final plan was submitted to the Federal Urban Renewal Administration, which approved the final project plan. On August 22, 1957, the Board of Estimate referred the matter to the City Planning Commission and, after public hearings, which were held on the 11th day of September, 1957, the City Planning Commission approved the project. Such approval was issued in a report dated October 2, 1957. On the 25th day of October, 1957, the Board of Estimate held public hearings on the final approval of the project and the resolution set forth as "Exhibit A" hereto. On November 21, 1957, these resolutions appeared on the calendar of the Board of Estimate but consideration of the resolutions was adjourned to November 26, 1957. On November 26, 1957, as aforesaid, the Board of Estimate took final action in approving the Lincoln Square Urban Renewal Project.

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Among the resolutions passed by the Board of Estimate on that date was a resolution approving the sponsorship contract with Fordham University for the collegiate site. The site plan submitted by the Committee on Slum Clearance to the City Planning Commission is annexed hereto and made a part hereof as "Exhibit B."

The City of New York has consistently followed certain planning procedures in connection with Title I projects. In the earliest stages of a proposed project, tentative bids to purchase the property are solicited from prospective rede-

88 velopers. The renewal or redevelopment plan is then drawn in accordance with the utilization needs of the tentative sponsors. In the earliest planning stages of the Lincoln Square Project, the Committee on Slum Clearance, following its usual procedures, made extensive inquiry as to prospective redevelopers. Upon Fordham's assurance that it could and would utilize over 300,000 square feet of the project area, the renewal plan was specifically formulated so as to
89 restrict an area of that size to re-use as a collegiate center.

The collegiate center consists of approximately 320,000 square feet of land and in accordance with the redevelopment proposal will be used by Fordham University for a Downtown Graduate Center, comprising the Schools of Law, Education, Business and Social Service.

Although Section 72-k of the General Municipal Law requires that the project site be disposed of through public auction with the property being sold to the highest bidder, the restriction on re-use of the collegiate center to redevelopment
90 by a college or university so completely narrows the field of competitive bidding that acquisition and use by Fordham is a virtual certainty.

Fordham University has now entered into a formal sponsorship agreement with the City of New York, which agreement has been approved by the Board of Estimate. The agreement provides in part that Fordham will bid a specific sum for the acquisition of the Collegiate Center. Although it is within the realm of legal possibility that another collegiate institution may appear at public auction and acquire the collegiate site by submitting a bid higher than the price agreed to between Fordham and the City of New York, the

likelihood of such an occurrence strains credulity. In every previously processed Title I project in the City of New York, the sponsor has purchased the site specified in the sponsorship contract at public auction for the amount set forth in the sponsorship contract. Moreover, on information and belief, there has never even been a bidder other than the designated sponsors. With certainty of being the ultimate purchaser, Fordham has already incurred planning expenses for building design. In addition, Fordham, together with the other sponsors of the Lincoln Square Project, 92 have since February 1, 1957 been operating a Lincoln Square Urban Renewal Project Information Center at their own expense.

Plaintiffs' objections to the Lincoln Square Urban Renewal Project are solely related to Fordham University's participation as a redeveloper and the corresponding aid and financial subsidy which will be given to a sectarian educational institution by reason of Fordham's participation. At the same time, it should be emphasized that the Project has been considered and passed upon as an entity. The approval and 93 findings by the City Planning Commission pursuant to Section 72-k of the General Municipal Law were based upon considerations of the nature of the entire sixty-eight acres of the Project. Moreover, prior approvals by the Federal Urban Renewal Administration have been predicated upon the condition of the area as a whole. Parenthetically, it should be understood that classification of the Project area as substandard is not made on the basis of the substandard character of each and every structure within the area but is instead based upon an overall determination. Specific individual structures within the Lincoln

Square area are clearly standard and possibly even superior.

Therefore, inasmuch as legally mandatory findings were made with respect to the area as a whole and the redevelopment plan as an entity, if any part of the plan is adjudicated to be illegal, the entire plan as presently formulated and processed, must fall.

The reality of financial aid and subsidy to Fordham University is readily apparent. The
95 entire purpose of Title I of the Federal Housing Act of 1949, as amended, is to provide a subsidy to encourage private enterprise to construct new facilities and structures in areas presently deemed to be substandard. The actual cost of this subsidy is borne two-thirds by the Federal government and one-third by the local authority proposing the project. Specifically, in the case of Lincoln Square, the Acquisition Appraisal, upon which the Project was promulgated and initiated, showed a total estimated cost of acquisition of $41,710,000. The report indicated that this estimate was made on the basis of detailed studies
96 by the Committee on Slum Clearance. The assessed valuation of the Project area was stated in the Acquisition Appraisal to be $34,655,000 for the tax year 1955-1956.

The Acquisition Appraisal estimated an average land acquisition cost of $20.35 per square foot. Nevertheless, Fordham has agreed to purchase the collegiate site and the City of New York has agreed to sell the collegiate site for a price of $7 per square foot. The differential between acquisition cost and the sales price to Fordham, together with supporting facilities provided by the City of New York, will result in a direct subsidy to Fordham University of a sum

in excess of $3,500,000. The precise amount of the subsidy is, however, irrelevant, for any subsidy of any amount, no matter how minimal, is constitutionally precluded.

Defendants will undoubtedly contend that the price to be paid by Fordham represents fair re-use value and fair market value and for that reason no subsidy has been or will be granted.

Even if we examine Fordham's arrangement with the City of New York on the basis of such a position, the realities of the situation show the 98
fact of subsidy.

Initially, it was proposed that Fordham pay a price of $5 per square foot for the collegiate site. At that time the appraisal prepared by George A. Hammer of Charles F. Noyes Co. showed an appraised re-sale value of $4.84 per square foot. However, prior to May 24, 1957, Mr. Hammer raised the proposed disposition price to Fordham to $8 per square foot. This proposed disposition price was subsequently revised downward to $6.75 per square foot, and appraisals by two other appraisers engaged by the Committee on 99
Slum Clearance assigned a re-use value to the collegiate site of $6.71 per square foot and $6.50 per square foot. Significantly, Edward J. Crawford, Jr., one of the appraisers, considered the comparative method of establishing the market value of the real estate in question by collating and analyzing price data on sales of similar and comparable property within the City of New York. Mr. Crawford's analysis showed that in the 24 most recent sales of real property, all but one of the 24 sales were made at a price per square foot greater than the price being paid by Fordham. Seventy-five per cent of those sales were at prices over $16 per square foot, ranging

from $16.20 to $57.87. Only three such sales were made at a price below $10 per square foot. The average price for the 24 sales was $21.50 per square foot. In spite of the result of his analysis of comparable sales in the free market, Mr. Crawford concluded that the re-use value of the collegiate site was $6.71 per square foot. He reached this conclusion by translating an assumed annual income into capital value at an assumed rate of interest.

101 Completely independent, however, of considerations of the accuracy of re-use appraisals, it is clear that the provisions for public auction of the collegiate site cannot result in a free market determination of value, for such value has already been substantially diminished by the limitation on re-use to collegiate institutions, and such restriction has been imposed solely by reason of Fordham University's sponsorship and agreement to purchase. Thus, substantial benefit has been conferred upon Fordham merely by reason of the re-use restriction, for if it were not for such
102 restriction, Fordham would necessarily be competing with other purchasers who might desire to acquire the site for housing or some other purpose.

Even in the absence of these facts, there can be no doubt that federal and local funds are being and will be used for the Lincoln Square Project. The legislative scheme to confer a subsidy to achieve the publicly desirable result of slum clearance is unquestionably valid. However, a sectarian educational institution is constitutionally precluded from obtaining the benefits of such subsidy. If the collegiate sponsor was Columbia University, New York University or some college not affiliated with a particular re-

ligious group, objections to the Project on the grounds of subsidy would be untenable. However, Fordham University, by reason of its denominational character, cannot be granted aid and subsidy regardless of whether such subsidy serves a public purpose.

The framers of the Federal Constitution in the First Amendment (as extended to the States by the Fourteenth Amendment), and the framers of the Constitution of the State of New York, in adopting Article 11, Section 4, believed that in order for religion to survive undominated by the 104
State, a divisive and protective wall must be erected between the two. Any financial aid extended to a religious organization by government must in the end result in governmental control of that religious organization.

The Constitution of the State of New York specifically prohibits such aid and subsidy, regardless of amount. Article 11, Section 4 provides:

> "Neither the State nor any subdivision thereof shall use its property or credit or any 105
> public money, or authorize or permit either to be used, *directly or indirectly,* in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (Emphasis supplied.)

Moreover, Article 1, Section 7, of the State Constitution requires the power of eminent domain

to be exercised for a public use. The denominational character of Fordham University results in conflict with that provision of the State Constitution, for, by the very definition of a denominational organization, it is not dedicated to use by the public generally. The fact that Fordham opens its doors to persons who are not of the Roman Catholic faith makes no difference. It is still the Roman Catholic Church which is promoted by Fordham and Fordham is still a creature of that church.

107 The above-stated facts make it clear that the Lincoln Square Urban Renewal Project is illegal and invalidly authorized in that it violates provisions of the Constitution of the State of New York and the First and Fourteenth Amendments of the Constitution of the United States.

Plaintiffs seek a stay pending the hearing and determination of their motion for a temporary injunction restraining the defendants from proceeding with the Lincoln Square Urban Renewal Project. Unless such stay is granted and continued by temporary injunction, plaintiffs will be

108 irreparably injured. The Board of Estimate has now authorized the acquisition of the Project site. Such acquisition will be accomplished by both purchase and condemnation. Thus, the assets of the City of New York are immediately subject to waste by the expenditure of such funds for an illegal purpose. In addition, in the absence of injunctive process, the City of New York can and will enter into contracts for the purchase of portions of the Project area. Such contracts will be legally binding upon the City unless they are made conditional upon a subsequent determination of the legality of the Project. Upon acquisition of realty, eviction proceedings can be and

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will be commenced against the plaintiffs who are residential and business tenants in the area. Therefore, unless a stay is granted and continued by a temporary injunction order, plaintiffs will be placed in an irretrievable position to their prejudice, for all of which they have no adequate remedy at law.

Plaintiffs believe that they have a good and meritorious action and that there is no defense to this action.

For the foregoing reasons, we respectfully request that defendants be stayed from land acquisition and the further processing of the Lincoln Square Title I Urban Renewal Project and that plaintiffs' motion for a temporary injunction be granted.

110

No prior application has been made for the relief sought herein.

SIDNEY DICKSTEIN.

(Sworn to on November 27, 1957.)

Exhibit A, Annexed to Affidavit of Sidney Dickstein

111

BOARD OF ESTIMATE
MEETING

November 26, 1957, at 11 A. M.

No. 1

R-2682, 7724, 7913, 8167,
8349, 8407

IN THE MATTER of approval of the Urban Renewal Plan, pursuant to Title I of the National Housing Act, and approval of acquisition of real property, pursuant to Section 72-k of the General

112 *Exhibit A*

Municipal Law of the State of New York, for an Urban Renewal Project, designated as Lincoln Square to be erected on a site generally bounded by West 70th Street, Amsterdam Avenue, West 66th Street, Broadway, Columbus Avenue, West 60th Street, Amsterdam Avenue, West 66th Street, and the New York Central Railroad right-of-way, Borough of Manhattan.

The hearing in this matter was fixed for October 24, 1957, by resolution adopted on October 9, 1957 (Cal. No. 113). On October 24, 1957 (Cal. No. 31), the hearing was continued to October 25, 1957. On October 25, 1957 (Cal. No. 1), the hearing was closed and the matter was laid over without date.

113

Communication dated November 12, 1957, from the Deputy Mayor requesting on behalf of the Mayor and the President of the Borough of Manhattan that the matter be restored to the calendar for November 21, 1957.

On November 21, 1957 (Cal. No. 50), the hearing was closed and the matter was laid over to November 26, 1957.

114 Report of the City Planning Commission (CP-13508, dated October 2, 1957) printed in full in Calendar of the Board of Estimate for October 24, 1957 (Cal. No. 31).

Communication dated October 3, 1957, from the Committee on Slum Clearance, submitting reports and relocation schedule for the project.

Communication dated October 16, 1957, from the Committee on Slum Clearance, submitting agreements and resolutions.

Communication dated November 22, 1957, from the Chairman, Committee on Slum Clearance, en-

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closing copy of a communication dated November 19, 1957 from the Archbishopric of New York withdrawing the offer of St. Matthew's Church to be a tentative sponsor for the institutional site located within the Lincoln Square project, and a copy of a communication dated November 21, 1957 from the American Red Cross offering to sponsor the redevelopment of this institutional site consisting of approximately 50,000 square feet on the west side of Amsterdam Avenue between 66th and 67th Streets under the terms of a redevelopment contract to be approved by the Board of Estimate and the Federal Government.

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The Committee recommends that the American Red Cross be substituted as the tentative sponsor for redevelopment of this institutional area.

COMMUNICATION dated November 15, 1957, from the Attorneys for Lincoln Guild Housing Corporation requesting the Board of Estimate to waive requirement of furnishing a completion bond contained in Section 502 of the proposed agreement.

Resolutions for consideration, as follows:

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A—Approving Amendatory Advance Planning Contract. (Passed)

B—Approving Urban Renewal Plan. (Passed)

C—Approving, ratifying and confirming filing of application for Capital Grant Contract. (Passed)

D—Approving Capital Grant Contract. (Passed)

E—(1) Approving Acquisition of real property required for the project. (Passed)

118 *Exhibit A*

(2) That the acquisition by the City of all real property in the project is in the interest of the City, and the health and welfare of its residents and effectuate the purposes of Subdivision 2 of Section 72-k of the General Municipal Law. (Passed)

F—Authorizing Bureau of Real Estate to sell real property acquired for redevelopment in five parcels. (Passed as amended)

G—Approving contract with Lincoln Center for the Performing Arts, Inc., for redevelopment of performing arts site. (Passed as amended)

119

H—Approving contract with Fordham University for redevelopment of Collegiate site. (Passed as amended)

I—Approving contract with Webb & Knapp Lincoln Square Corporation, a wholly owned subsidiary of Webb & Knapp, Inc., for redevelopment of housing site. (Passed as amended)

120

J—Approving redevelopment plan under Redevelopment Companies Law and contract with Lincoln Guild Housing Corporation, a corporation sponsored by the Teachers Guild, for redevelopment of cooperative housing site. (Laid over to Jan. 23, 1958)

K—Approving contract with St. Matthews Roman Catholic Church of the City of New York, for redevelopment of institutional site. (Passed with amendment substituting American Red Cross)

Exhibit A

L—Approving option for purchase at $160,000 of 5 acres in Bayside, Queens, from Cord Meyer Development Company and transfer to National Guard of New York for relocation of Armory. (Laid over to Jan. 23, 1958)

M—Authorizing Comptroller to deposit with State Comptroller for account of National Guard of the State of New York $1,000,000 for aid in construction of new Armory, pursuant to provisions of Section D41-48.0 of the Administrative Code, enacted by Chapter 664 of Laws of 1956. (Laid over to Jan. 23, 1958)

N—Approving option to purchase Kennedy Building for $2,500,000. (Defeated)

O—Authorizing Comptroller to audit accounts. (Passed)

Exhibit B, Annexed to Affidavit of Sidney Dickstein

Map of Lincoln Square.

(See opposite)

APPENDIX I

SITE PLAN

LINCOLN SQUARE URBAN RENEWAL PROJECT

SUBMITTED BY COMMITTEE ON SLUM CLEARANCE

4-4

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Affidavit of Robert Moses, Read in Support of Defendants and Defendants-Intervenors' Motions and in Opposition to Plaintiffs' Motions

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

131

State of New York }
County of New York } ss.:

Robert Moses, being duly sworn, deposes and says:

1. I am the Chairman of the Committee on Slum Clearance, an agency of the City of New York, which is charged with the development, planning and execution of projects for the clearance and redevelopment of slum areas in the City
132 of New York. I am also City Construction Co-Ordinator, Commissioner of Parks, and a member of the City Planning Commission. In addition, I am Chairman of the Triborough Bridge and Tunnel Authority, Chairman of the State Council of Parks, and President of the Long Island Park Commission. I have on occasions been employed as a consultant by other governmental agencies throughout the country to report on improvements in congested areas where knowledge of housing, planning, zoning and real estate was indispensable. In all of these capacities I have attained experience in matters affecting city planning and community redevelopment.

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2. I have directed and co-ordinated the planning and execution of large-scale slum clearance and neighborhood rehabilitation projects, undertaken by both public agencies and private capital. I am fully familiar with New York City's slum problem, the methods which must be used to combat this evil and the obstacles which must be overcome in order to accomplish sound urban redevelopment.

3. I am familiar with the facts of the above entitled action and the application of the plain- 134
tiffs herein for a temporary injunction.

4. This affidavit is made in opposition to the plaintiffs' motion for temporary injunction. Its purpose is to set forth the facts which demonstrate that:

a. The plaintiffs do not demonstrate a clear legal right to the ultimate relief demanded in their complaint and therefore no right to the drastic remedy of temporary injunction;

b. The plaintiffs will not suffer "irreparable injury" from the acts sought to be enjoined; and 135

c. If such acts should be enjoined, serious public injury far outweighing any possible injury to the plaintiffs would result.

ACTION OF THE BOARD OF ESTIMATE WITH RESPECT TO LINCOLN SQUARE PROJECT

5. At a meeting of the Board of Estimate, on November 26, 1957 (Cal. No. 1), the Board considered resolutions approving the following documents relating to the Lincoln Square Urban Re-

newal Project. The amendatory advance planning contract with the Federal government; the Urban Renewal Plan for the Lincoln Square Project (a copy of which will be handed to the Court and deemed annexed hereto as Exhibit A); an application for capital grant contract with the Federal Government; and a proposed capital grant contract with the Federal Government. The Board also had before it a resolution that the acquisition by the City of all real property in the project area and the sale at public auction thereof
137 as provided in the contract with the Federal government are in the interest of the City and the health and welfare of its residents and effectuate the purposes of General Municipal Law, § 72-K, subd. 2, and a resolution authorizing the acquisition by the City of New York of the real property required for the project.

6. The Board of Estimate approved each of the foregoing Proposals. As a method of effectuating such proposals there was also placed before the Board for consideration a resolution au-
138 thorizing the Bureau of Real Estate to sell the real property acquired for redevelopment in five parcels and five separate resolutions with respect to each of five sponsorship contracts. The Board separately approved the resolution as to the method of sale and each of three of the sponsorship contracts. The Board laid over consideration of a fourth, *i.e.*, a proposed sponsorship contract with Lincoln Guild Housing Corporation relating to the redevelopment of a cooperative housing site; and amended the fifth contract by substituting the American Red Cross for the St. Mathew's Roman Catholic Church of the City of

New York, as a sponsor for redevelopment of the institutional site. Among the four sponsorship contracts thus approved by the Board was that proposed to be entered into with Fordham University for redevelopment of the collegiate site, a draft copy of which, together with amendments approved by the Board, is annexed hereto, and marked Exhibit B.

RELIEF SOUGHT BY THE PLAINTIFFS

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7. The plaintiffs seek to enjoin the defendants permanently from executing or carrying out the terms of the "sponsorship contract with Fordham University"; from acquiring the project area or any part thereof by condemnation or otherwise; from further processing the project with the Federal Urban Renewal Administration and from expending or committing funds of the City of New York in connection with the project. In this application they seek to enjoin such acts pending the determination of their action for permanent injunction.

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A. FACTS DEMONSTRATING THAT PLAINTIFFS HAVE NO LEGAL RIGHT TO ULTIMATE RELIEF SOUGHT.

(a) *Judicial Opinion in Loebner v. City of New York.*

8. Before setting forth the facts which demonstrate that there is no likelihood whatsoever of the plaintiffs' ultimate success upon the merits in this action, it is appropriate to set forth the

opinion of Mr. Justice Dineen in *Loebner* v. *City of New York*, 162 N. Y. S. 2d 233, Supreme Ct., Spec. Term, N. Y. Co. 1957, wherein the precise question raised by the plaintiffs was in issue. Though Mr. Justice Dineen dismissed the complaint on the ground that the action was prematurely brought, his opinion clearly indicated that it was his view that there was no merit to the plaintiffs' contention.

Thus, the Court stated:

143 "* * * The plaintiffs contend that from the very beginning of the proposed plan Fordham University and St. Matthew's Roman Catholic church have been recognized not only as potential but eventual purchasers of a portion of the land embraced within the project and that commitments have been made to that effect which are violative of the United States Constitution, First Amendment, and the State Constitution, Article 11, Sec. 4, in that it amounts tc assistance and a subsidy to private or religious institutions.

144 The plaintiffs do not deny that neither constitution prohibits dealing with religious institutions provided no financial aid is extended or given either directly or indirectly. In order to dispel any suspicion or doubt that any such assistance or subsidy might be given it must be assumed that the defendant officials will not violate their statutory duties (*Kane* v. *Walsh*, 295 N. Y. 198, 206, 66 N. E. 2d 53, 56, 163 A. L. R. 1351) and will follow the procedure set forth for the acquisition and disposal by resale of the real property as provided therefor in Section 72-k of the General Municipal Law and also conform to

the National Housing Act of 1949, as amended. In this connection reference must be had to the affidavit of the Chairman of the Committee on Slum Clearance submitted in support of the motion detailing what has been accomplished as of now and what is still sought and necessary in order to bring the project out of the realm of a dream into the world of reality. The statements of the Chairman by reason of the various offices he has held and his experience as a consultant and planner of urban development together 146 with the views of some well-known authorities on neighborhood planning indicate that no community plan of the size intended would be complete without taking into consideration occupancy by churches and schools. This has been recognized as an integral part of well-planned community projects as can be understood from reference thereto found in the Manual of Policies established for use of Local Public Agencies which may seek federal assistance in carrying out their programs. *It seems that no valid objection can be made to the inclusion of schools and churches in the proposed development provided such institutions intend to become part of the project or community at their own expense without gift or subsidy of public funds. That Fordham University and St. Matthew's Church may ultimately become purchasers of the portion of the property sought by them at a price below that at which it was acquired originally for the purposes of redevelopment, is a possibility but not necessarily so and would not constitute a deviation from a public purpose nor a gift* 147

of public funds. If the public good is enhanced it is only secondary that private interests may be benefited (*Murray* v. *LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884). To assist the defendants in determining whether the project can be carried to a successful completion Fordham University and St. Matthew's Church have indicated a willingness on their part to bid on portions of the land required for their purpose. Such indi-
149 cations are not binding on the defendants nor any other persons or corporations interested in the project. Sponsorship contracts are yet to be drawn and executed and even these contracts have no force and effect to exclude prospective purchasers from becoming successful bidders at the required auction sale for the resale of the land." (Emphasis added.)

(b) *Religious Institutions As Part of a Planned Community.*

150 9. The plaintiffs have raised the following constitutional question: Do the Federal and State Constitutions require that sectarian institutions be excluded from a neighborhood or community which is being replanned and reconstructed as part of a slum clearance and redevelopment project?

10. I have been informed by counsel that there are no constitutional provisions requiring such exclusion. It is my considered opinion that this is the only conclusion consistent with the realities and the needs of sound neighborhood rehabilitation and community planning.

11. There can be no doubt that churches and schools, whether they be public, private or parochial, have always been regarded as an integral and essential part of a neighborhood or community. Zoning laws have reflected this vital axiom of desirable social planning. The Courts of this State and those of other States throughout the nation have taken judicial notice of this fact. Private community developers have reaffirmed it through their conduct as well as their words, and governmental agencies invested with the duty of launching planned communities, have utilized this concept and incorporated it in their plans. Moreover, the many technical studies on community planning and neighborhood redevelopment made by eminent specialists in the field demonstrate clearly the vital necessity for the inclusion of such facilities in planning a desirable neighborhood or community.

12. I do not know of any private community developers who could dispute the validity of this principle. Indeed, Mr. Hugh Potter, 1954 Chairman of the Community Builders' Council of the Urban Land Institute, and developer of the River Oaks Community in Houston, Texas, has expressly stated:

> "I would not think of planning a large tract without providing for several church sites. It gives co-ordination to families in the neighborhood, and aids in development of community spirit * * *." (Community Builders Handbook, Members Edition 1954, prepared by Community Builders Council of the Urban Land Institute, p. 89).

Moreover, in discussing the community facilities which should be included in site planning, the Community Builders Handbook states:

> "Future school and church sites should receive careful attention when establishing the general plan" (page 89).

Clarence Perry, the well-known authority on planned neighborhoods, has also emphasized the importance of churches in the planning of a neighborhood community. In his monograph "The Neighborhood Unit" (Vol. VII of "Regional Survey of New York and Its Environs," published in 1929 by the Committee on Regional Planning of New York and Its Environs), Mr. Perry wrote (pp. 73 and 74):

"CHURCHES

According to the United States religious census of 1916, in the cities of 100,000 to 300,000 population there was one church edifice for approximately every 1,500 people. Ten years earlier the same average was 1,243, showing a gradual trend towards more people per church. In 1916 the average for smaller cities was about 1,200. *On the basis of these data it would seem advisable, in a neighborhood unit of around 5,000 population, to reserve sites for three churches.*

From the standpoint of physical capacity a single large edifice would serve the religious needs of any ordinary neighborhood district, provided the residents were all members of the same faith. Such sectarian homogeneity might happen through a concerted move on

the part of a given religious group or through the selection effected by the sales plan of the development. In either case there would probably be sufficient foreknowledge to serve as a guide in the allotment of a church site.

It is estimated that there are over 800 'community churches' now functioning in the United States. In accordance with this plan several denominations are able to agree upon a form of service and religious endeavor which makes it possible for them to unite in the use of a single edifice. Whether or not, however, such an amalgamation would happen in a given unit could hardly be foretold in advance unless such a plan were definitely a part of the original project. 158

Unless, therefore, the planner has definite knowledge of the religious needs of the future community, he may well reserve sites for three churches in a neighborhood unit which is to have an average American population. * * * " (Emphasis supplied.)

In the same volume of the Regional Survey of New York and Its Environs, Robert Whitten, in his monograph "The Economics of Land Subdivision", writes (at p. 334): 159

"The purpose of public control of the subdivision of the land should be that of securing an appropriate street and block layout with relation to good city planning and zoning principles. It invoives the creation of a good neighborhood environment and its correlation with the planning and zoning of the entire region. Some characteristics or essen-

tials of a good neighborhood environment are as follows:

1. The neighborhood must have all functions and facilities of a complete residence unit. It must have *churches*, schools, shops, assembly halls, clubs and small parks or commons." (Emphasis added.)

Again, in an authoritative discussion of the
161 fundamental principles to be followed in planning desirable and stable communities, the Bulletin of the Federal Housing Administration entitled "Planning Profitable Neighborhoods" states as follows (Technical Bulletin No. 7, U. S. Government Printing Office, 1938, F. H. A. form No. 2370, at p. 12):

"Provide School and Church Sites

If a subdivision is large enough to warrant the consideration of all community requirements, locations should be provided
162 for schools and churches.

* * *

These buildings produce a favorable impression as to the stability of a community and, therefore, should form one of the early demonstrations of neighborhood growth. The selection of convenient sites for such facilities as *schools*, *churches*, and local shopping centers will go far in increasing a subdivision's salability." (Emphasis supplied.)

Further demonstration of the basic proposition that churches and public or parochial schools are

natural and often indispensable components of a neighborhood plan, is found in a study made by the Urban Land Institute (Technical Bulletin No. 16, September, 1951). The purpose of the study was described as follows (p. 5):

"PLANNING COMMUNITY FACILITIES FOR BASIC EMPLOYMENT EXPANSION"

"This manual is designed for the use and guidance of industrial corporations, developers, planners and *public officials who may be concerned either directly or indirectly with the planning and development of living accommodations for employees and their families in new and expanding industrial establishments or other employment centers.* Special emphasis is placed upon clearly understanding the extent of the demand for community facilities generated by new defense installations in an area unprepared for such expansion. *While related directly to the current mobilization program, the procedures outlined are applicable to peace time and can be modified to either long-term or short-term programs.*" (Emphasis supplied.)

164

165

The following discussion of required land uses is set forth at pages 14 and 16 of the Bulletin:

"COMMUNITY LAND USE

The suggested land uses in this section will be discussed in relation to the need per 1,000 employees in basic industry. General land uses which will be required for the com-

munity, exclusive of any requirements for basic industry, are as follows:

* * *

5. Semi-public areas.

a. *Churches.*

b. Hospital or clinic (see discussion, page 16).

c. Private and *Parochial* schools.

167 d. Cemetery area (if any).

e. Hotel, inn, or motel.

f. Other open space uses.

* * *

Semi-Public Buildings

These include *churches*, private and *parochial schools*, community club houses, lodge halls or other similar places of assembly. Sites for these uses should be reserved in the land use plan for the development, but so
168 related to the street system and adjacent area that they may be developed for residential uses if the demand does not materialize for the allocated use." (Emphasis supplied.)

13. All of the above conclusions regarding the necessity for the inclusion of churches and schools in a neighborhood or community plan are based upon experience. Volume II of the Supplementary Report of the Urbanism Committee to the National Resources Committee, dated January 15, 1938 (United States Government Printing Office, Washington, 1939), sets forth the results of a study of 144 planned communities, i.e., com-

munities which were newly constructed from the start according to a more or less comprehensive physical plan. Among the communities studied were those established by industry with a view to providing a suitable labor supply and those established by government in connection with both war-time industry and peace-time public works, such as large dams.

14. I have selected for comment herein only those communities established by governments in order to demonstrate that the fact that such com- 170
munities were set up by governmental agencies did not prevent the inclusion in the community plan of churches and schools. For example, Brooklyn (Noreg Village), in Camden County, New Jersey, was an emergency war housing town developed in 1918 by the Noreg Realty Company for the United States Shipping Board. In describing the community facilities of the town, Vol. II of the Supplementary Report of the Urbanism Committee states at page 56:

> "Churches and schools are located in the east section of the town * * *." 171

Another example of an emergency war housing project developed in 1918 for the United States Shipping Board, is Hilton, located in Warwick County, Virginia. In describing the plan for Hilton, Vol. II of the Supplementary Report of the Urbanism Committee states in part, at page 62:

> "* * * Sites for four churches and a school and community buildings were laid out."

172 Again, in 1918, an emergency war housing project, originally known as Yorkship Village and later known as the Fairview Section of Camden, New Jersey, was established for employees and developed for the United States Shipping Board. The description of the plan, set forth in Vol. II of the Supplementary Report of the Urbanism Committee, contains the following statement:

"*The Plan.*

173 * * *

Provisions for * * * a community building, church and school site to form a self-contained community, were made in keeping with the need and location of the site. * * * "

In 1930, the United States Department of the Interior laid out the plan for Boulder City, Clarke County, Nevada. In describing the application of general planning principles to the town design, Vol. II of the Supplementary Report of the Urbanism Committee states on page 69:

174 "Church sites are grouped in close proximity to each other for the alleged purpose of stimulating religious activities."

Norris, Tennessee, was established in 1933-34 and developed by the Tennessee Valley Authority. The Community facilities are described in part as follows in Vol. II of the Supplementary Report of the Urbanism Committee at page 74:

"*Community Facilities.*

Additional sites have been reserved for about seven other public and semi-public

structures, including an inn, church, club house and additional stores. * * * "

15. After the National Housing Act of 1949 took effect, the Federal Agency having jurisdiction of the program for slum clearance and redevelopment established a Manual of Policies and Requirements For Local Public Agencies seeking federal assistance for such programs. The Manual expressly recognizes that churches and schools are to be included in the redevelopment plans and that such institutions may become the purchasers and redevelopers of some of the cleared parcels. For example Part 2 Chapter 5 § 3 which prescribes the elements of a redevelopment plan states as follows:

"Land uses to be established shall be shown by category-residential, commercial, industrial, public or semi-public, and other use categories as appropriate—and by types within each category.

* * *

(4) public and *Semi-Public* use shall be specifically identified, as 'elementary school,' 'church', etc."

* * *

"SUPPORTING DOCUMENTATION

* * *

PUBLIC AND SEMI-PUBLIC REUSES—INCLUDING COMMUNITY FACILITIES

The types of public and semi-public reuses (school, park, hospital, civic buildings, public parking, fire and police station, church, YMCA or other) and the planning and other considerations which dictated their inclusion shall be discussed."

178 *Affidavit of Robert Moses*

16. The experience of the Federal Housing and Home Finance agency and its predecessors under the federal slum clearance and urban renewal programs is also illustrative of the practical interpretation that governments are not constitutionally precluded from permitting religious institutions to participate in such programs. Thus, information obtained from officials of the Federal Housing and Home Finance Agency indicates that sales of redevelopment parcels were made to churches in the following urban renewal projects:
179

St. Louis Memorial Plaza,
St. Louis, Missouri;
Redevelopment Project No. 1 or 2,
Norfolk, Virginia;
Front Street Project,
Hartford, Connecticut.

The foregoing information was not intended to be exhaustive of all such cases, but was merely transmitted by the Federal Agency as being illustrative of the fact that participation by religious institutions in a redevelopment program is not
180 unusual.

(c) *Facts demonstrating that no "aid" to Fordham University is involved*

17. Plaintiffs complain that the provisions of Section 4 of Article XI of the Constitution of the State of New York and the due process clause of the Federal Constitution have been violated by the action of the Board of Estimate in approving the Lincoln Square Urban Renewal Project and the execution of the sponsorship contracts with

Fordham University. The allegations in support of this conclusion are found in paragraphs "Fifteenth," "Sixteenth," "Eighteenth" and "Nineteenth" of the complaint. These allege that there is contemplated a sale of the collegiate site in the Lincoln Square Urban Renewal area to Fordham University for the price of $7.00 per square foot after acquisition of said site for a price of more than $16.00 per square foot, resulting, it is claimed, in a direct subsidy to Fordham University of a sum in excess of $3,500,000 (Paragraph "Fifteenth"); and that the sale to Fordham University of such property at any price will result in an indirect subsidy to that University in that it will be aided by the condemnation power of the City of New York (Paragraph "Fifteenth"). 182

18. The gravamen of the complaint made by the plaintiffs in this connection appears to be that the City of New York has or is about to enter into a contract with Fordham University binding the City to sell the collegiate site to that institution. In this the plaintiffs choose to misunderstand the nature of the sponsorship contract. 183

19. No slum clearance and redevelopment plan could possibly be undertaken by the City without the assurance that at the auction sale there would be at least one redeveloper for each portion of the property to be privately redeveloped, who would make a minimum bid at an agreed upset price for such portion of the area offered for sale. The City obtains this assurance by inviting preliminary bids during the early formative stages of the plan for the purpose of ascertaining whether there are persons willing to undertake redevelop-

ment in a site in accordance with the proposed plan. When the plan moves toward final completion, these interested persons are invited to enter into contracts which are called sponsorship contracts. The purpose of these contracts is to make certain that there will be available at the public auction, bidders willing to acquire title for the purpose of redevelopment in accordance with the plan.

185 20. Thus it is clear that the sponsorship contract which has been approved by the Board of Estimate for execution with Fordham University is intended only to assure the City that at least one bidder will appear at the public sale and that there is at least one educational institution interested in developing the site in accordance with the Plan. It does not constitute the sole method by which the redevelopment of the "Collegiate" site might be effectuated. It is merely the most expeditious method in the judgment of the officials of the City of New York. It is important to note that even if Fordham executes the sponsorship
186 contract, bidding at the public sale for the educational area will *still* be open to any institution, nonsectarian or sectarian, willing to devote the area to educational purposes. Since there is no requirement in the Plan that the successful bidder be a sectarian institution, it does not necessarily follow, as the plaintiffs assume, that Fordham University *must* be the successful bidder. In this connection we point to paragraph 302 at page 12 of the proposed sponsorship contract between the City and Fordham University, annexed hereto as Exhibit B. In that paragraph the contract clearly provides that while the land in the educational

site (called the collegiate site in the contract) must be used "solely for educational purposes, including uses normally concomitant to such purposes," it also provides that "the plans finally utilized for construction of the Project and that the actual buildings, building locations and other site details will be further developed" subject to the approval of the Committee on Slum Clearance. It also provides that the site plan included therein is only one of the "possible" plans and not necessarily the plan finally utilized for the project (Exhibit B, p. 12 § 302). Elsewhere 188
throughout the contract it clearly appears that the contract is conditional upon Fordham being the successful bidder (See for example, pp. 3, 4, 6 and 7).

21. The foregoing demonstrates conclusively, contrary to the plaintiffs' assertions, that this Plan is not so hedged about with restrictions as to make it impossible for any educational institution other than Fordham University to be the redeveloper of the educational site. I emphasize the fact that the Plan calls for the development of 189
this area for "*Collegiate*" *purposes* (Exh. A, p. R-3). It is broad enough to permit of its effectuation by a nonsectarian college as well as by a sectarian college. The execution of the sponsorship contract will not change the Plan but will merely be affording to Fordham University the same right as could be afforded under the Plan to any nonsectarian educational institution. That the identity of the sponsors is not an essential element of the Plan is conclusively proved by the fact that the Plan was approved by the Board of Estimate even though one of the tentative spon-

sors, St. Matthews Roman Catholic Church, withdrew at the very last moment while its sponsorship contract was pending before the Board of Estimate for approval, and without any difficulty the American Red Cross was substituted as a proposed sponsor for redevelopment of the institutional area. (See Plaintiffs' Exhibit A annexed to affidavit of Dickstein). The same can happen with equal facility with respect to the educational area.

191 22. Even assuming what cannot now be known to be a fact—that the cost of acquisition of the land to the City of New York will be $16.00 per square foot and that Fordham University will be the successful bidder at $7.00—no aid or subsidy to Fordham University will thereby result. It must be borne in mind that the cost at which the City will acquire the property by condemnation will be the fair market value as of the time of taking. Reflected in this amount must be such factors as the value of the improvements and the value of the land for its best available use. On
192 the other hand, when the property so acquired is offered for sale in furtherance of the Slum Clearance and Redevelopment Project Plan, it will be offered for sale, as General Municipal Law sec. 72-k requires, under terms, conditions and proposed deed restrictions which narrowly restrict its future use and which, furthermore, will require the successful bidder to relocate the site occupants, clear the site and complete the redevelopment improvement, all upon time schedules fixed by the Board of Estimate in accordance with the

terms and conditions of the Plan. Thus, it is clear that there is no equivalence between what the City acquires and what it sells to private redevelopers. It therefore follows that no valid comparison can be made between what the City pays for what it has acquired and the amount it receives for what it sells. Consequently, the granting of a subsidy may not be inferred from the fact that it cost the City more to acquire the land subsequently resold. If the City incurs a monetary "loss" upon the resale, that "loss" is merely the price of the ben- 194
efits derived by the public from elimination of a slum, the assurance that the consummation of the Plan will prevent the recurrence of slum conditions and the obligation of the redeveloper to bear the cost of demolition and relocation. The requirement for public bidding (Gen. Mun. Law, § 72-k) excludes the possibility that the redeveloper will acquire the land at less than "its fair value for the uses specified in the redevelopment plan". [National Housing Act of 1949 Title I Sec. 103(a)].

It goes without saying that here, as in all prior 195
slum clearance projects, the public agencies involved will comply with the law and the redevelopers to whom the land is made available will be those who have bid the highest price at public auction. Requirements of a bona fide sale are thereby met; there will thus be affected a fair exchange of considerations. No gift of public funds is involved in a situation of this nature.

23. The mere fact that condemnation is exercised to accomplish the public purposes of clearing a slum area does not in and of itself result in "aid" to the redeveloper if it should happen to be

a religious institution. It is common knowledge that most of the property owned by the City has been acquired at some time or other through the exercise of the power of condemnation. This fact has never been regarded as constituting a bar to the sale of city-owned property to a religious organization. Indeed there are many instances of legislation authorizing the sale of publicly-owned property to philanthropic institutions of a sectarian nature. (*e.g.*, see Laws of 1963, ch. 360, § 1, reenacted as Administrative Code, § D41-8.0;
197 Laws of 1919, ch. 508, § 1, reenacted as Administrative Code, § D41-12.0; Laws of 1929, ch. 451, § 1, reenacted as Administrative Code, § D41-18.0). Thus, if the City were to carry this project forward by approval of the Plan and condemnation of the site and thereafter offer it for sale at public auction for redevelopment, obviously, no unconstitutional "aid" could possibly be spelled out if Fordham happened to be the successful bidder. The mere fact that Fordham has, in advance of the public sale, indicated its willingness to be a redeveloper cannot alter the logic of this
198 demonstration.

24. The plaintiffs allege in paragraph "Eleventh" of the complaint that the upset price for the educational area that Fordham University will be required to bid has been revised from $5 a square foot to $8 to $6.75 and finally to $7, and the affidavit in support of the motion for temporary injunction (pp. 10-11) attempts to indicate that the final upset figure of $7 a square foot bears no relation to the fair re-use and the fair market value of the site for use as a collegiate area.

However, allegations of this type are irrelevant to the question in issue. General Municipal Law § 72-k requires the resale price be that determined by a sale at public auction. Preliminary appraisals such as those alleged by the plaintiffs are intended merely to facilitate the holding of the public auction. The fair reuse value of a particular property is the price obtained at the public auction.

This principle is implicitly recognized in plaintiff's own claim of subsidy which by their own theory is measured by the difference between the cost of acquisition and the actual resale price. (Affid. of Dickstein, p.10.) 200

B. Facts Demonstrating That the Plaintiffs Will Not Suffer Irreparable Injury From the Actions Sought to Be Enjoined.

25. The plaintiffs concede that:

> "if the collegiate sponsor was Columbia University, New York University, or some college not affiliated with a particular religious group, objections to the project on the grounds of subsidy would be untenable" (Affidavit of Sidney Dickstein, p. 12). 201

It follows from this concession that in so far as the Plan provides for the redevelopment of a section of the area for collegiate purposes, the exercise of condemnation for its effectuation is unassailable. It further follows that if a sponsorship contract were to be executed with a nonsectarian education institution, condemnation in that event would likewise be unassailable. Since

an examination of the plan demonstrates unquestionably that there is nothing in the plan which limits its effectuation to a sectarian institution (see Exhibit A, deemed annexed hereto, p. R-3), condemnation for the purpose of effectuating the Plan is unquestionably legal *on the basis of the plaintiffs' own concession* as well as on the basis of the well-established judicial authorities which will be cited in the brief in opposition to the plaintiffs' application.

203 26. Therefore, plaintiffs' allegations of irreparable injury must be confined to the consequences that might ensue if Fordham University executes the sponsorship contract approved by the Board of Estimate and becomes the successful bidder at the public auction. I have been advised by counsel, and I believe this affidavit supports the conclusion, that there is no merit whatsoever to the plaintiffs' claim of such unconstitutionality. However, assuming, without conceding, that the execution of a sponsorship contract with Fordham University and of a rede-
204 velopment contract in the event that it is the successful bidder should be held to be unconstitutional, *this would not affect the legality of the condemnation of the area for the purposes of effectuating the Plan.* Just as a new non-sectarian sponsor was substituted when the St. Matthew's Roman Catholic Church withdrew, so could a new non-sectarian sponsor be substituted for the development of the area in accordance with the Plan. The only result of such a holding would be the ineligibility of Fordham University to be the redeveloper. The public purpose which

supports the exercise of condemnation would not be diminished in any way by the necessity of finding a substitute for Fordham University.

27. Contrary to the contention made by the plaintiffs, the Board of Estimate separately approved the Redevelopment Plan and separately considered each sponsorship contract which was placed before it. This is apparent from the plaintiffs' own Exhibit A (annexed to the affidavit of Dickstein). Thus, while approving the Plan, the Board did not approve every sponsorship contract placed before it. The contract with the Lincoln Guild Housing Corporation was laid over to January 23, 1958, and the proposed contract with St. Matthews Roman Catholic Church for redevelopment of the institutional site was amended by substituting the American Red Cross in place of the Church as a sponsor. 206

28. In other parts of the country, it has been the practice of cities in processing urban renewal projects, to draw up plans and condemn slum property without soliciting tentative sponsors until after approval of the plans and condemnation. Surely, if that had been done in the present case, the plaintiffs, by their own concession, would have no basis for challenging the constitutionality of the condemnation proceeding. 207

29. It thus appears that regardless of who turns out to be the sponsor and redeveloper of the collegiate area, the exercise of condemnation and the expenditure of funds for the purpose of clearing and redeveloping the area is legal. As stated

208 by the Court in *Kaskel* v. *Impellitteri, supra*, 306 N. Y. 73, 93 "Section 72-k of the General Municipal Law is drawn upon the basis, upheld in *Matter of Murray* v. *LaGuardia*, that slum clearance is in itself a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital." The plaintiffs, whether they be taxpayers or residents of the area, would still have to accept the normal consequences of
209 condemnation. Thus their injury, if any, flows from the clearly legal act of condemnation and not from the proposed sponsorship of Fordham University. Therefore, such injury does not constitute "irreparable injury" which equity may enjoin.

C. Facts Demonstrating Grave Public Injury From Granting of Injunction.

30. Conversely, if the acts complained of herein were to be enjoined, serious public detriment would result. After a long period of negotiation
210 and processing, a slum area is about to be cleared in the public interest. Responsible sponsors are ready and willing to cooperate with the city and federal governments in this important public purpose. A stay of the activities necessary to effectuate the plan might well result in a loss to the city of one or more sponsors by the time the stay is lifted. Rising prices, labor costs, lessened availability of materials, and changes in the status or position of the sponsors could intervene to cause a change in the present intentions. Moreover, the bargaining position which the city has

obtained through its continuous negotiations over the period since the inception of the Lincoln Square project could be undermined by such a stay, and the time, energy and public funds which have already been expended for the effectuation of this vital public purpose might be lost.

31. In view of the foregoing, it is apparent that while the plaintiffs will be in the same position whether or not Fordham is held to be legally eligible for sponsorship and redevelopment of the collegiate area, the public will be gravely injured 212 by any stay that might be imposed during the pendency of the present action.

32. For the foregoing reasons, I respectfully urge that the application for a temporary injunction be denied, with costs.

ROBERT MOSES.

(Sworn to on December 4, 1957.)

Exhibit A, Annexed to Affidavit of Robert Moses 213

Urban Renewal Plan and Maps.

(Omitted by Stipulation.)

Exhibit B, Annexed to Affidavit of Robert Moses

Proposed Sponsorship Agreement Between the City of New York and Fordham University.

(Omitted by Stipulation.)

214

Answer

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Defendants, by Peter Campbell Brown, Cor-
215 poration Counsel, their attorney, answering the complaint herein, alleges:

ANSWERING THE FIRST CAUSE OF ACTION

1. Deny each and every allegation contained in paragraph "Third" of the complaint and respectfully refer the Court to the provisions of Section 72-k of the General Municipal Law for the content and meaning thereof.

2. Deny each and every allegation of para-
216 graph "Fifth" of the complaint and respectfully refer the Court to the Lincoln Square Urban Renewal Project Plan, a copy of which is annexed hereto as Exhibit A and made a part hereof, and to the applicable statutes.

3. Deny each and every allegation contained in paragraph "Sixth" of the complaint, except admit that the Lincoln Square Urban Renewal Project Plan includes a site of approximately 320,230 square feet comprising the collegiate area, and housing sites and a site for a performing arts center.

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4. Deny each and every allegation contained in paragraph "Seventh" of the complaint, except admit that the procedures followed by the defendants include the execution of an agreement between the City of New York and persons who had indicated their willingness to become redevelopers of the Project site; that the agreements so executed between the City of New York and the sponsors or redevelopers contain provisions by which, among other things, the sponsor agrees to bid a minimum price at the public auction of the site to be redeveloped; that upon purchase of said site the sponsor agrees to use it for the purpose set forth in the Project plan and the City of New York agrees to acquire the site by condemnation or otherwise, to sell the site at public auction, and to convey the site to the sponsor if the said sponsor is the successful bidder at the sale; that said sponsorship agreements may only be executed after the Board of Estimate has approved the project plan and authorized the execution of the sponsorship contract.

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5. Deny each and every allegation contained in paragraph "Eighth" of the complaint, except admit that in the judgment of the defendants the procedure for obtaining tentative sponsors for redevelopment of the project area is the most feasible method of effectuating the project plan.

6. Deny each and every allegation contained in paragraphs "Tenth" and "Eleventh" of the complaint, except admit that defendant Moses received an offer from Fordham University to become the sponsor of the collegiate area and to bid

at the public sale thereof after its acquisition at a price of $5 a square foot, which was later increased to $6.75 a square foot and finally fixed at $7 a square foot and that said offer was conditionally approved by defendant Moses subject to final approval by the Board of Estimate of the City of New York.

7. Upon information and belief, deny each and every allegation contained in paragraph "Twelfth" of the complaint, except admit that
221 Fordham University is an educational corporation incorporated by Special Act of the Legislature of the State of New York [Chapter 61, Laws of 1846]; that said University is conducted by members of the Society of Jesus, a religious order of the Roman Catholic Church; that enrollment therein is not limited to students of the Catholic Faith; and that courses in the Catholic Religion are conducted in certain of its schools.

8. Deny each and every allegation contained in paragraph "Thirteenth" of the complaint, ex-
222 cept admit that the solicitation of sponsorship bids for the sites comprising the project area was widely advertised; admit that no educational institution other than Fordham University submitted a tentative bid for the collegiate site; admit that if Fordham University is the successful bidder at the public auction of the collegiate site after its acquisition by the City of New York, the City of New York will be obligated to sell the collegiate site to Fordham University pursuant to the sponsorship agreement which has been approved by the Board of Estimate and provided

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that such sponsorship agreement is executed by Fordham University; and further deny any knowledge or information sufficient to form a belief as to the allegation "that there is no institution which presently intends and has funds available to purchase, 320,230 square feet in the Borough of Manhattan at a price of $7 per square foot for the use required by the Project Plan".

9. Deny each and every allegation contained in paragraph "Fourteenth" of the complaint, except admit that the cost of acquisition of the collegiate site has been estimated to be in excess of $16 a square foot.

224

10. Deny each and every allegation contained in paragraphs "Fifteenth", "Eighteenth", "Nineteenth" and "Twentieth" of the complaint.

11. Deny each and every allegation contained in paragraph "Sixteenth" of the complaint, except admit that after submission of the Project Plan by the Committee on Slum Clearance to the City Planning Commission and after public hearings held on September 11, 1957, the City Planning Commission approved the Project Plan in a report dated October 2, 1957, a copy of which is annexed hereto as Exhibit C.

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12. Deny each and every allegation contained in paragraph "Seventeenth" of the complaint except admit that after public hearings held on October 25, 1957 the Board of Estimate on November 26, 1957 took action with respect to the Lincoln Square Urban Renewal Plan as is more particularly set forth in Exhibit D annexed hereto and made a part hereof.

226 *Answer*

ANSWERING THE SECOND CAUSE OF ACTION

13. Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "Twenty-first" and "Twenty-second" of the complaint.

14. Deny each and every allegation contained in paragraphs "Twenty-third" and "Twenty-fifth" of the complaint except as otherwise pleaded herein.

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15. Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "Twenty-fourth" and "Twenty-sixth" of the complaint, except admit that the Board of Estimate has approved the Project Plan and the acquisition by condemnation or otherwise of the area comprised within the project including the collegiate site and that the premises known as 101 West 60th Street, 49 Amsterdam Avenue and 40 Columbus Avenue are situated within the collegiate area.

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16. Deny each and every allegation contained in paragraphs "Twenty seventh" and "Twenty-eighth" of the complaint.

FOR A FIRST, DISTINCT AND SEPARATE DEFENSE TO THE CAUSES OF ACTION ALLEGED IN THE COMPLAINT, DEFENDANTS ALLEGE:

17. Article 18 of the Constitution of the State of New York, authorizes the State Legislature to provide in such manner, by such means and upon such terms and conditions as it may prescribe for "the clearance, replanning, reconstruction and

rehabilitation of sub-standard and insanitary areas, * * * ". Said article further provides that "for and in aid of such purposes, notwithstanding any provision in any other article of this Constitution" the Legislature may "authorize cooperation with and the acceptance of aid from the United States;" and "grant the power of eminent domain to any city."

18. Pursuant to Article 18 of the Constitution, the State Legislature enacted General Municipal Law, Section 72-k, which authorizes the governing 230
board of a municipal corporation to acquire real property necessary for or incidental to the clearance, re-planning, reconstruction and neighborhood rehabilitation by the purchaser in such manner as may be prescribed by the Board of Estimate or other governing body.

19. Pursuant to the above quoted constitutional and statutory provisions, the Committee on Slum Clearance submitted to the City Planning Commission an urban renewal plan for the Lincoln Square Urban Renewal Project. The said Com- 231
mission held a public hearing on the said plan on September 11, 1957. After such hearing and after consideration and analysis of the proposal, the City Planning Commission adopted a report dated October 2, 1957, a copy of which is annexed hereto as Exhibit C. Said report sets forth the consent of the City Planning Commission for the acquisition of the real property in the Project area and the finding of the City Planning Commission made after a public hearing, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabili-

tation of real property in a sub-standard and insanitary area.

20. On October 24 and 25, 1957, the Board of Estimate held a public hearing upon the Lincoln Square Urban Renewal Plan. At its meeting on November 26, 1957 the Board of Estimate took action with respect to the Lincoln Square Urban Renewal Project as is more particularly set forth in Exhibit D annexed hereto and made a part hereof. Among the resolutions adopted by the
233 Board of Estimate in furtherance of this plan for the clearance and redevelopment of the Lincoln Square area were:

a. A resolution approving the Lincoln Square Urban Renewal Plan (Cal. No. 1-B, a copy of which is annexed hereto as Exhibit E —the Urban Renewal Plan which was approved by this resolution is already annexed to this answer as Exhibit A);

b. A resolution approving a capital grant contract to be entered into between the City
234 and the Federal government (Cal. No. 1-D; a copy of which is annexed hereto as Exhibit F—a copy of the proposed capital grant contract which was approved by this resolution is annexed hereto as Exhibit G);

c. A resolution approving acquisition of the real property required for the Project (Cal. No. 1-E-(1), a copy of which is annexed hereto as Exhibit H);

d. A resolution setting forth that the acquisition by the City of all real property in the Project is in the interest of the City and the

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health and welfare of its residents and effectuates the purposes of subdivision 2 of Section 72-k of the General Municipal Law (Cal. No. 1-E-(2), a copy of which is annexed hereto as Exhibit I);

e. A resolution authorizing the Bureau of Real Estate to sell real property acquired for redevelopment at public auction, passed as amended (Cal. No. 1-F, a copy of which is annexed hereto as Exhibit J);

236

f. A resolution approving a proposed sponsorship contract with Fordham University relating to the redevelopment of the collegiate site (Cal. No. 1-H, a copy of which is annexed hereto as Exhibit K; the proposed sponsorship contract with Fordham University which was approved by this resolution is annexed hereto as Exhibit B).

21. The acts performed by the defendants herein as set forth in the report of the City Planning Commission and in the resolutions and minutes of the meeting of the Board of Estimate, as above set forth, and the acts and the effectuation of the said Urban Renewal Project are in connection with the acquisition of property for the clearance, replanning and redevelopment of a sub-standard and insanitary area and are in conformance with and pursuant to the provisions of Article 18 of the New York State Constitution and General Municipal Law, Section 72-k.

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22. The acquisition of a sub-standard and insanitary area for clearance and redevelopment is sanctioned by New York State Constitution,

238 Article 18, and General Municipal Law, Section 72-k. The acquisition of real property for the clearance, replanning and redevelopment of a sub-standard and insanitary area are for a public use and the expenditure of monies by the City of New York with respect thereto is lawful and is not a waste of the City's funds or property.

FOR A SECOND, DISTINCT AND SEPARATE DEFENSE TO THE CAUSES OF ACTION ALLEGED IN THE COMPLAINT, DEFENDANTS ALLEGE:

239 23. Upon the acquisition by the City of the Lincoln Square Project area for clearance, replanning and redevelopment, the property in the said area will be resold at the highest marketable price at public auction to redevelopers who will be required to clear and redevelop the property in the manner and subject to the conditions and restrictions as prescribed by the Board of Estimate in accordance with Section 72-k of the General Municipal Law.

240 24. The sponsorship contract with Fordham University, as annexed hereto as Exhibit B, does not violate the provisions of Article 11, Section 4 of the Constitution of the State of New York nor the provisions of the First and Fourteenth amendments to the Constitution of the United States.

25. The resale of the collegiate site of the Lincoln Square Project area to Fordham University, if it should be the highest bidder at the public auction, as aforesaid, will not violate the provisions of Article 11, Section 4 of the Constitution of the State of New York nor the First and Four-

teenth amendments of the Constitution of the United States.

WHEREFORE, defendants pray for judgment dismissing the compiaint and that they be granted such other, further, different or alternative relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

PETER CAMPBELL BROWN,
Corporation Counsel,
Attorney for Defendants,
Office & P. O. Address,
Municipal Building,
Borough of Manhattan,
City of New York.

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(Verified.)

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Exhibit A, Annexed to Answer

Urban Renewal Plan and Maps.

(Omitted by stipulation.)

Exhibit B, Annexed to Answer

Proposed Sponsorship Agreement between the City of New York and Fordham University.

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(Omitted by stipulation.)

Exhibit C, Annexed to Answer

City Planning Commission Report on Lincoln Square Urban Renewal Plan and Project, October 2, 1957, CP-13508, Cal. No. 2.

(Omitted by stipulation.)

246

Exhibit D, Annexed to Answer

Resolutions of Board of Estimate of November 26, 1957.

(Omitted—same as Exhibit A annexed to affidavit of Sidney Dickstein, verified November 27, 1957.)

247

Exhibit E, Annexed to Answer

BOARD OF ESTIMATE

CITY OF NEW YORK

(Cal. No. 1—Item B)

Resolution of Board of Estimate of The City of New York Approving the Urban Renewal Plan and the Feasibility of Relocation for Project No. N.Y. R-2.

WHEREAS, Under the provisions of Title I of the Housing Act of 1949, as amended, the Housing and Home Finance Administrator is authorized to provide financial assistance to local public agencies for undertaking and carrying out urban renewal projects; and 248

WHEREAS, It is provided in such Act that contracts for financial aid thereunder shall require that the Urban Renewal Plan for the respective project area be approved by the governing body of the locality in which the project is situated and that such approval include findings by the governing body that: (1) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the Urban Renewal Plan; (2) the Urban Renewal Plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; and (3) the Urban Renewal Plan conforms to a general plan for the development of the locality as a whole; and 249

250 *Exhibit E*

WHEREAS, The City of New York (herein called the "Local Public Agency") has entered into a planning contract for financial assistance under such Act with the United States of America acting by and through the Housing and Home Finance Administrator, pursuant to which Federal funds are provided for the urban renewal project (herein called the "Project") identified as "Lincoln Square" and encompassing the area bounded by West 60th Street, Amsterdam Avenue, West 66th Street, lands of New York Central Railroad,
251 West 70th Street, Amsterdam Avenue, West 66th Street and Columbus Avenue in the City of New York, State of New York (herein called the "Locality"); and

WHEREAS, The Local Public Agency has applied for additional financial assistance under such Act and proposes to enter into an additional contract or contracts with the Housing and Home Finance Agency for the undertaking of, and for making available additional financial assistance for, the Project; and

252 WHEREAS, The Local Public Agency has made detailed studies of the location, physical condition of structures, land use, environmental influences, and the social, cultural, and economic conditions of the Project area and has determined that the area is a substandard and insanitary area and that it is detrimental and a menace to the safety, health, and welfare of the inhabitants and users thereof and of the Locality at large, because of excessive coverage by predominantly old law tenement type buildings, serious disrepair and critical

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deficiency in sanitary facilities of the residential structures, incompatible conversions of buildings and incompatible mixture of uses within the area and the members of this Governing Body have been fully apprised by the Local Public Agency and are aware of these facts and conditions; and

WHEREAS, There has been prepared and referred to the Board of Estimate of the Locality (herein called the "Governing Body") for review and approval an Urban Renewal Plan for the Project Area, dated January 28, 1957 as revised to August 19, 1957, and consisting of 6 pages, 2 Exhibits and 9 Maps supported by the Land Acquisition Plan, Land Disposition Plan and Cost Estimates and other documentation incorporated in the Final Project Report; dated January 28, 1957 as revised to August 19, 1957 and Comprehensive Relocation Plan which material, data and recommendations are not a part of said Urban Renewal Plan; and

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WHEREAS, A general plan has been prepared and is recognized and used as guide for the general development of the Locality as a whole; and

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WHEREAS, The City Planning Commission, which is the duly designated and acting official planning body for the Locality, has submitted to the Governing Body its report and recommendations respecting said Urban Renewal Plan for the Project area and has certified that said Urban Renewal Plan conforms to the said general plan for the Locality as a whole, and the Governing Body has duly considered said report, recommendation, and certification of the planning body; and

256 *Exhibit E*

WHEREAS, Said Urban Renewal Plan for the Project area prescribes certain land uses for the Project area and will require, among other things, changes in zoning, the vacation and removal of streets, alleys and other public ways, the establishment of new street patterns, the location and relocation of sewer and water mains and other public facilities, and other public action; and

WHEREAS, The Local Public Agency has prepared a plan for the relocation of families that
257 may be displaced as a result of carrying out the Project in accordance with said Urban Renewal Plan and has submitted to the Governing Body a Relocation Plan for the Project, identified as "Comprehensive Relocation Plan"; and

WHEREAS, There has also been presented to the Governing Body information and data respecting the Relocation Plan which has been prepared by the Local Public Agency as a result of studies, surveys, and inspections in the Project area and the assembling and analysis of the data and in-
258 formation obtained from such studies, surveys, and inspections; and

WHEREAS, The members of this Governing Body have general knowledge of the conditions prevailing in the Project area and of the availability of proper housing in the locality for the relocation of families that may be displaced from the Project area and, in the light of such knowledge of local housing conditions, have carefully considered and reviewed such Relocation Plan; and

WHEREAS, It is necessary that the Governing Body take appropriate official action respecting

the Relocation Plan and said Urban Renewal Plan for the Project, in conformity with the contract or contracts for financial assistance between the Local Public Agency and the United States of America acting by the Housing and Home Finance Administrator; now, therefore, be it,

Resolved, By the Board of Estimate of The City of New York as follows:

1. That it is hereby found and determined that the Project is a substandard and insanitary area and qualifies as an eligible Project area under Section 72-k of the General Municipal Law; 260

2. That said Urban Renewal Plan for the Project aforementioned, having been duly reviewed and considered, it is hereby approved, and the Secretary of the Board of Estimate be and is hereby directed to file said copy of said Urban Renewal Plan with the minutes of this meeting;

3. That it is hereby found and determined that said Urban Renewal Plan for the Project area conforms to said general plan of the Locality; 261

4. That it is hereby found and determined that the financial aid provided and to be provided pursuant to said contract for financial assistance pertaining to the Project is necessary to enable the land in the Project area to be redeveloped in accordance with the Urban Renewal Plan for the Project area;

5. That it is hereby found and determined that the above mentioned Urban Renewal Plan for the

262 *Exhibit E*

urban renewal area will afford maximum opportunity, consistent with the sound needs of the Locality as a whole, for the urban renewal of such areas by private enterprise;

6. That it is hereby found and determined that the proposals set forth in the Relocation Plan for the proper relocation of the families displaced in carrying out the Project in decent, safe and sanitary dwellings in conformity with acceptable standards are feasible and can be reasonably and
263 timely effected to permit the proper prosecution and completion of the Project; and that such dwellings available or to be made available to such displaced families are at least equal in number to the number of displaced families and are not generally less desirable in regard to public utilities and public and commercial facilities than the dwellings of the displaced families in the Project area, are available at rents or prices within the financial means of the displaced families, and are reasonably accessible to their places of employment.

264 7. That in order to implement and facilitate the effectuation of the Urban Renewal Plan hereby approved it is found and determined that certain official action must be taken by this Body with reference, among others, to changes in zoning, the vacation and removal of street, alleys and othr public ways, the establishment of new street patterns, the location and relocation of sewer and water mains and other public facilities and, accordingly, this Body hereby: (a) pledges its cooperation in helping to carry out such Urban

Exhibit E 265

Renewal Plan; (b) requests the various officials, departments, boards, and agencies of the Locality having administrative responsibilities in the premises likewise to cooperate to such end and to exercise their respective functions and powers in a manner consistent with said Urban Renewal Plan; and (c) stands ready to consider and take appropriate action upon proposals and measures designed to effectuate said Urban Renewal Plan; and

8. That additional financial assistance under 266
the provisions of Title I of the Housing Act of 1949, as amended, is necessary to enable the land in the Project area to be renewed in accordance with the Urban Renewal Plan for the Project area and, accordingly, the filing by the Local Public Agency of an application or applications for such financial assistance under said Title I is hereby approved.

A true copy of resolution adopted by the Board of Estimate on November 26, 1957.

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RUTH W. WHALEY,
Secretary.

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Exhibit F, Annexed to Answer

#1-D 11-26-57

WHEREAS, Under Title I of the Housing Act of 1949 as amended and supplemented, the United States of America (herein called the "Government") has tendered to The City of New York (herein called the "Local Public Agency") a proposed offer of "Capital Grant Contract," pursuant to which the Government would extend certain federal financial assistance to the Local
269 Public Agency in connection with a certain urban renewal project described as Lincoln Square and designated Project No. N.Y. R-2; and

WHEREAS, The Local Public Agency has given due consideration to said proposed offer; and

WHEREAS, The Local Public Agency is duly authorized, under and pursuant to the Constitution and Laws of the State of New York to undertake and carry out said project and proposed contract; now, therefore, be it

270 RESOLVED, By the Board of Estimate, as follows:

Section 1. The proposed offer of the Government to the Local Public Agency designated "Capital Grant Contract" Contract No. N.Y. R-2(G) consisting of Parts I and II providing for the making by the Government to the Local Public Agency of a project Capital Grant under Title I of the Housing Act of 1949 as amended in connection with that certain project described therein which is situated in the Borough of Manhattan, City of New York, and is designated in

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said proposed contract as Project No. N.Y. R-2 is hereby in all respects approved and accepted.

Section 2. The Mayor or Deputy Mayor is hereby authorized and directed to execute the "Capital Grant Contract" Contract No. N.Y. R-2(G) when executed by the Housing and Home Finance Administrator, acting for the United States of America, substantially in the form herein considered, approved as to form by the Corporation Counsel and the Acting City Clerk is hereby authorized and directed to attest the same and affix the seal of The City of New York.

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Section 3. The Chairman, or Assistant to Chairman, or Director of the Committee on Slum Clearance is hereby authorized and directed to forward counterparts of said Capital Grant Contract to the Housing and Home Finance Agency, together with such other documents relative to the approval and acceptance thereof as may be required by the Government.

Section 4. The Chairman, or Assistant to the Chairman, or Director is hereby authorized to execute and file requisitions, together with necessary supporting documents, with the Government, in accordance with the Capital Grant Contract, requesting payments to be made on account of the Project Capital Grant provided in the Capital Grant Contract, and to do and perform all other things and acts required to be done or performed in order to obtain such payments.

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Section 5. This resolution shall take effect immediately.

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Exhibit G, Annexed to Answer

Proposed Capital Grant Contract between City of New York and Urban Renewal Administration.

(Omitted by stipulation.)

Exhibit H, Annexed to Answer

#1-E1 11/26/57

275 WHEREAS, following public hearings, the City Planning Commission has found that substandard conditions and insanitary housing conditions exist in the Lincoln Square Area, and has further found that the Acquisition by the City of the real property comprising the area is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area and has consented thereto under the provisions of Subdivision 2 of Section 72-k of the General Municipal Law as amended, and

276 WHEREAS, The Board of Estimate, following public hearing, has found that the acquisition by the City of all the real property (not presently owned by it) in said area by condemnation is in the interest of the City and the health and welfare of its residents and effectuate the purposes of Subdivision 2 of Section 72-k of the General Municipal Law, and

WHEREAS, following the acquisition of said property by the City, it is intended by the Board of Estimate that said property shall be sold at public auction for redevelopment in accordance with the

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provision of the said Section 72-k of the General Municipal Law as amended, and

WHEREAS, The Committee on Slum Clearance has caused to be prepared and has transmitted to the Board of Estimate an Acquisition Map entitled "Acquisition Map Showing Real Property to be Acquired for Lincoln Square Slum Clearance Project within the area bounded by West 60th Street, Amsterdam Avenue, West 66th Street, Lands of New York Central Railroad, West 70th Street, Amsterdam Avenue, West 66th Street and Columbus Avenue, excluding all streets, Borough of Manhattan, dated August 12, 1957 prepared by Earl B. Lovell-S. P. Belcher, Inc., and

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WHEREAS, The Committee on Slum Clearance has caused to be prepared and has transmitted to the Board of Estimate the proposed terms and conditions upon which said public auction shall be had;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Estimate:

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1. That the Acquisition Map entitled "Acquisition Map Showing Real Property To Be Acquired For Lincoln Square Slum Clearance Project Within The Area Bounded by West 60th Street, Amsterdam Avenue, West 66th Street, Lands of New York Central Railroad, West 70th Street, Amsterdam Avenue, West 66th Street and Columbus Avenue, excluding all streets, Borough of Manhattan," dated August 12, 1957 prepared by Earl B. Lovell-S. P. Belcher, Inc. be and the same is hereby approved.

280 *Exhibit H*

2. That the Corporation Counsel be and he hereby is authorized and directed to institute condemnation proceedings for the acquisition of all the real property hereinafter described by making application to the Supreme Court of the State of New York to have the compensation, which should be made to the owners of, or to the persons interested in such property to be so acquired, ascertained and determined by the Court, without a jury, as provided by Title B of Chapter 15 of the Administrative Code. The nature and extent of
281 the improvements hereby intended is the acquisition of title in fee simple absolute by The City of New York of all the real property in the area necessary to be acquired for the Slum Clearance Project, including the acquisition of the fee in public streets where not already owned by the City for street purposes to:

All those certain tracts of land, together with the buildings and improvements erected thereon, and the appurtenances thereunto belonging, situated in the Borough of Manhattan, County of New York, City and State of New York, bounded and
282 described as follows:

Bearings which appear in the following descriptions refer to the Borough Survey of the Borough President's Office, Manhattan.

AREA #1

BEGINNING at the corner formed by the intersection of the westerly line of Columbus Avenue with the northerly line of West 60th Street; running thence westward along the northerly line of West 60th Street a distance of 800 feet to its intersection with the easterly line of Amsterdam Avenue;

Exhibit H

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thence northward along the easterly line of Amsterdam Avenue, crossing West 61st Street a distance of 260 feet 10 inches to the northeasterly corner of said street and avenue; thence eastward along the northerly line of West 61st Street a distance of 250 feet; thence northward parallel with the easterly line of Amsterdam Avenue a distance of 100 feet 5 inches; thence westward parallel with the northerly line of West 61st Street a distance of 250 feet to a point in the easterly line of Amsterdam Avenue; thence northward along the easterly line of Amsterdam Avenue a distance of 100 feet 5 inches to its intersection with the southerly line of West 62nd Street; thence eastward along the southerly line of West 62nd Street a distance of 800 feet to its intersection with the westerly line of Columbus Avenue; thence southward along the westerly line of Columbus Avenue crossing West 61st Street a distance of 461 feet 8 inches to the point or place of Beginning. The area contained within the lines described above is 344, 230 square feet.

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Area #2

Beginning at the corner formed by the intersection of the westerly line of Columbus Avenue with the northerly line of West 62nd Street; running thence westward along the northerly line of West 62nd Street a distance of 800 feet to its intersection with the easterly line of Amsterdam Avenue; thence northward along the easterly line of Amsterdam Avenue, crossing West 63rd Street and West 64th Streets a distance of 722 feet 6 inches to its intersection with the southerly line of West 65th Street; thence eastward along the southerly

line of West 65th Street a distance of 724 feet 9⅛ inches to its intersection with the westerly line of Broadway; thence southeastward along the westerly line of Broadway a distance of 149 feet 8¼ inches to its intersection with the westerly line of Columbus Avenue; thence southward along the westerly line of Columbus Avenue, crossing West 64th and West 63rd Streets a distance of 593 feet 1⅜ inches to the point or place of BEGINNING. The area contained within the lines described above is
287 573,133 square feet.

AREA #3

BEGINNING at a point in the southerly line of West 66th Street distant 325 feet east of the corner formed by its intersection with the easterly line of Amsterdam Avenue; running thence eastward, along the southerly line of West 66th Street a distance of 25 feet; thence southward, parallel with the easterly line of Amsterdam Avenue, a distance of 100 feet 5 inches; thence westward, parallel with the southerly line of West 66th Street
288 a distance of 25 feet; thence northward, parallel with the easterly line of Amsterdam Avenue, a distance of 100 feet 5 inches to the point or place of BEGINNING. The area contained within the lines described above is 2,510 square feet.

AREA #3-A

BEGINNING at the corner formed by the intersection of the easterly line of Amsterdam Avenue with the southerly line of West 66th Street; running thence eastward along the southerly line of West 66th Street a distance of 122 feet; thence

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southward paraliel with the easterly line of Amsterdam Avenue a distance of 100 feet 5 inches; thence westward parallel with the southerly line of West 66th Street a distance of 122 feet to a point in the easterly line of Amsterdam Avenue; thence northward along the easterly line of Amsterdam Avenue a distance of 100 feet 5 inches to the point or place of BEGINNING. The area contained within the lines described above is 12,251 square feet.

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AREA #3-B

BEGINNING at a point in the southerly line of West 66th Street distant 198 feet east of the corner formed by its intersection with the easterly line of Amsterdam Avenue; running thence eastward along the southerly line of West 66th Street a distance of 27 feet; thence southward parallel with the easterly line of Amsterdam Avenue a distance of 100 feet 5 inches; thence westward parallel with the southerly line of West 66th Street a distance of 27 feet; thence northward parallel with the easterly line of Amsterdam Avenue a distance of 100 feet 5 inches to the point or place of BEGINNING. The area contained within the lines described above is 2,711 square feet.

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AREA #4

BEGINNING at the corner formed by the intersection of the westerly line of Amsterdam Avenue with the northerly line of West 66th Street; running thence westward along the northerly line of West 66th Street a distance of 800 feet to its intersection with the easterly line of West End Avenue; thence northward along the easterly

line of West End Avenue, crossing West 67th, West 68th and West 69th Streets a distance of 983 feet 4 inches to its intersection with the southerly line of West 70th Street; thence eastward along the southerly line of West 70th Street a distance of 525 feet; thence southward parallel with the westerly line of Amsterdam Avenue a distance of 100 feet 5 inches; thence eastward parallel with the southerly line of West 70th Street a distance of 275 feet to a point in the
293 westerly line of Amsterdam Avenue; thence southward along the westerly line of Amsterdam Avenue, crossing West 69th Street, a distance of 185 feet 5 inches; thence westward, parallel with the southerly line of West 69th Street a distance of 80 feet; thence southward, parallel with the westerly line of Amsterdam Avenue, a distance of 50 feet; thence eastward parallel with the southerly line of West 68th Street, a distance of 80 feet to a point in the westerly line of Amsterdam Avenue; thence southward, along the westerly line of Amsterdam Avenue, crossing West 68th and West 67th Streets, a distance of
294 647 feet 6 inches to the point or place of BEGINNING. The area contained within the lines described above is 755,053 square feet.

AREA #5

BEGINNING at the corner formed by the intersection of the northerly line of West 66th Street with the westerly line of West End Avenue; running thence northward along the westerly line of West End Avenue, crossing West 67th, West 68th and West 69th Streets, a distance of 983 feet 4 inches to its intersection with the southerly line of West 70th Street; thence west-

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ward along the southerly line of West 70th Street a distance of 512 feet 10¼ inches to lands of the New York Central Railroad Company; thence southward along the easterly line of lands of the New York Central Railroad Company, on a line forming an interior angle of 80° 59′ 07.02″, crossing West 69th, West 68th and West 67th Streets, a distance of 869 feet 10⅞ inches to a point of curvature; thence still southward, and along the lands of the New York Central Railroad Company, deflecting to the left on the arc of a circle having a radius of 4,967 feet a distance of 125 feet 11⅞ inches to its intersection with the northerly line of West 66th Street; thence eastward along the northerly line of West 66th Street a distance of 355 feet 2¾ inches to the point or place of BEGINNING. The area contained within the lines described above is 427,535 square feet, and be it further

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RESOLVED, That as authorized by Section B15-36.0 of the Administrative Code the title to the said property shall vest in The City of New York upon the entry of the court order granting the application to condemn; and be it further

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RESOLVED, that the Comptroller be and he hereby is authorized to pay the awards for the property described above and to be so acquired, together with interest thereon, and all bills of costs or other charges.

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Exhibit I, Annexed to Answer

#1-E2 11/26/57

WHEREAS, following public hearings, the City Planning Commission has found that substandard conditions and insanitary housing conditions exist in the Lincoln Square Area and has further found that the acquisition by the City of real property comprising the area is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a sub-
299 standard and insanitary area and has consented thereto under the provisions of Subdivision 2 of Section 72-k of the General Municipal Law, as amended, and has transmitted such findings and consent to the Board of Estimate, and

WHEREAS, the Board of Estimate has held a public hearing with respect to such project and acquisition, be it:

RESOLVED, by the Board of Estimate, that the acquisition by the City of all real property (not presently owned by it) in the Project Area by
300 purchase or condemnation and sale at public auction as provided in the contract with the Federal Government is in the interest of the City, and the health and welfare of its residents and effectuate the purposes of Subdivision 2 of Section 72-k of the General Municipal Law.

301

Exhibit J, Annexed to Answer

#1F 11/26/57

Resolved that the Director of the Bureau of Real Estate of the Board of Estimate be and he hereby is authorized and directed upon the acquisition and vesting of title to the real property required for the Lincoln Square Urban Renewal Project, to sell the real property in five parcels, excluding therefrom streets, at public auction, in accordance with the terms and conditions attached to the redevelopment contract to be entered into 302
between the City and Fordham University, as sponsor of the Collegiate Site, Lincoln Center for the Performing Arts, Inc., as sponsor of the Performing Arts Site, The American National Red Cross, as sponsor of the Institutional Site, Webb & Knapp Lincoln Square Housing Corporation, as sponsor of the Housing Site.

303

304

Exhibit K, Annexed to Answer

#1-H 11-26-57

WHEREAS, the Board of Estimate on November 26, 1957 (Calendar No. 1-B) approved the Urban Renewal plan for the Lincoln Square area, as an urban renewal project under Title I of the Housing Act of 1949, as amended; and

WHEREAS, the Committee on Slum Clearance has submitted a proposed contract between the
305 City and Fordham University, in connection with said project; and

WHEREAS, the Board of Estimate held public hearings on said project on the 24th and 25th days of October, 1957; and

WHEREAS, the Board of Estimate has considered and reviewed the proposed contract between the City and Fordham University; and

NOW THEREFORE, BE IT RESOLVED, by the Board of Estimate, as follows:

306

That the proposed contract between the City of New York and Fordham University, relating to the Lincoln Square Urban Renewal project to be redeveloped pursuant to the provisions of 72-k of the General Municipal Law, is hereby approved and the Mayor or Deputy Mayor is hereby authorized and directed to execute the same, when approved as to form by the Corporation Counsel, and the Acting City Clerk is hereby directed to attest the same and affix the seal of the City.

307

Answer of Defendant-Intervenor Fordham University

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

Defendant-intervenor Fordham University answers the complaint herein as follows: 308

1. It denies it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph First thereof.

2. As to the allegations contained in the second sentence of paragraph Fifth, it denies it has any knowledge or information sufficient to form a belief as to the approximate amounts to be borne respectively by the Federal Government and the City of New York, and it respectfully refers this Court to the provisions of Title I of the Federal Housing Act of 1949, as amended, 42 U. S. C., section 1451, *et seq.* for the statutory provisions determining the respective amounts to be borne by the Federal and City governments. 309

3. It denies each and every allegation contained in paragraph Sixth thereof except that the Lincoln Square Urban Renewal Project Plan contains a provision for the allocation of a site of approximately 320,230 square feet, comprising substantially the area bounded by Amsterdam and Columbus Avenues and West 60th and West

62nd Streets, for collegiate uses; a provision for a site to be used for a Performing Arts Center; and a provision for a housing site. The said Plan is annexed hereto and made a part hereof as Exhibit "A", and defendant respectfully refers this Court thereto for the exact and complete terms of said Plan.

4. It denies each and every allegation contained in paragraph Seventh thereof, except that
311 it admits that each person willing to undertake redevelopment of a site within the Project Area er rs into a sponsorship agreement with the City of New York pursuant to which such sponsor agrees to bid a minimum price at public auction for the particular site to be redeveloped, that if it is the successful bidder at said public auction it further agrees to use the site for the purposes set forth in the Project Plan, and the City of New York agrees to acquire the site by condemnation or otherwise, to sell the site at public auction and to convey the site to the sponsor if said spon-
312 sor is the successful bidder at the auction; and that said sponsorship agreements may be executed only after the Board of Estimate has approved the Project Plan and authorized the execution of sponsorship agreements.

5. It denies each and every allegation contained in paragraph Eighth thereof, except that it admits, upon information and belief, that the Committee on Slum Clearance is of the opinion that the obtaining of tentative sponsors for redevelopment of the Project Area is the most feasible method of effectuating the Project Plan.

6. It denies each and every allegation contained in paragraphs Tenth and Eleventh thereof, except that it admits that defendant Moses received an offer from Fordham University to become the sponsor of the collegiate site and to bid at the public auction thereof, after its acquisition by the City of New York, at a minimum price which was first fixed at $5 per square foot, then raised to $6.75 per square foot, and was finally fixed at $7 per square foot, and that said offer was conditionally approved by defendant Moses subject to 314
final approval of the Board of Estimate of the City of New York.

7. It denies each and every allegation contained in paragraph Twelfth thereof except it admits that Fordham University is an educational corporation incorporated by Special Act of the Legislature of the State of New York (Chapter 61 Laws of 1846, a copy of which is hereto annexed and made a part hereof as Exhibit "B") that said University is conducted by members of the Society of Jesus, a religious order of the Roman 315
Catholic Church; that enrollment therein is not limited to the students of the Catholic faith; and that courses in the Catholic religion are conducted in certain of its schools.

8. As to paragraph Thirteenth thereof it denies that it has any knowledge or information sufficient to form a belief as to the allegations that no educational institution other than Fordham submitted a bid for the collegiate site; that there is no institution which presently intends and has funds available to purchase 320,230 square

316 feet in the Borough of Manhattan, at a price of $7 per square foot for the use required by the Project Plan; and it denies that if the collegiate site is acquired by the City of New York and sold at public auction in accordance with the Plan, Fordham University is the only possible bidder and the defendant City of New York will be obligated to sell the collegiate site to Fordham University pursuant to the sponsorship agreement.

317 9. It denies it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph Fourteenth thereof.

10. It denies each and every allegation contained in paragraphs Fifteenth, Eighteenth, Nineteenth and Twentieth thereof.

11. It denies each and every allegation contained in paragraph Sixteenth thereof, except that it admits that after submission of the Project Plan by the Committee on Slum Clearance to the
318 City Planning Commission and after public hearings held on September 11, 1957 at which certain persons objected to said Project Plan on various grounds as shown by the minutes of the said hearing, the City Planning Commission approved the Project Plan in a report dated October 2, 1957.

12. It denies each and every allegation contained in paragraph Seventeenth thereof, except that it admits that after public hearings on October 25, 1957 at which certain persons objected to said Project Plan on various grounds, the Board of Estimate, on November 26, 1957, adopted a

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series of resolutions approving the Project Plan and some of the sponsorship agreements, including that of Fordham University, a copy of which is hereto annexed and made a part hereof as Exhibit "C".

13. It denies it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs Twenty-first and Twenty-second thereof.

320

14. As to paragraphs Twenty-third and Twenty-fifth thereof, defendant-intervenor repeats and reallieges each and every denial hereinabove set forth pertinent thereto.

15. It denies each and every allegation contained in paragraphs Twenty-seventh and Twenty-eighth thereof.

FOR A FIRST SEPARATE DEFENSE TO THE CAUSES OF ACTION ALLEGED IN THE COMPLAINT DEFENDANT-INTERVENOR ALLEGES:

321

16. Plaintiffs' contention that defendant-intervenor Fordham University should be barred as a matter of law from bidding at public auction or participating in slum clearance projects upon the same terms as other persons, firms and corporations, if adopted as law would deprive defendant-intervenor of the equal protection of the laws, contrary to Article I, Section 11 of the Constitution of the State of New York and the Fourteenth Amendment to the Constitution of the United

322 *Answer of Defendant-Intervenor Fordham University*

States, and would constitute a restriction upon the free exercise of religion, contrary to Article I, Section 3 of the Constitution of the State of New York and the First and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, defendant-intervenor Fordham University demands judgment dismissing the complaint, with costs.

323

SAXE, BACON & O'SHEA,
Attorneys for defendant-intervenor
Fordham University,
20 Exchange Place,
New York 5, N. Y.

(Verified.)

Exhibit A, Annexed to Answer of Fordham University

324

URBAN RENEWAL PLAN

(Omitted by stipulation)

325

Exhibit B, Annexed to Answer of Defendant-Intervenor Fordham University

CHARTER — FORDHAM UNIVERSITY

AN ACT *to incorporate St. John's College, Fordham.*

Passed April 10, 1846 by a two-third vote.
(Laws of New York, 1846, Chap. 61.)

The People of the State of New York, represented in Senate and Assembly do enact as follows: 326

1. Jacob Harvey, Peter A. Hargous, John McKeon, James R. Bayley, John Harley, John McCloskey, William Starrs, Hugh Kelly and David Bacon and their successors, are hereby constituted a body corporate, by the name of St. John's College, Fordham, the said corporation to be in all respects an university, and its object the promotion of education. The said corporation shall have perpetual succession, with power to sue and be sued, to make and use a common 327 seal, and alter the same at pleasure.

2. The persons named are hereby appointed trustees of the said corporation, of whom six members shall constitute a quorum for the transaction of business.

3. The said board of trustees shall appoint the professors and such other instructors as they may deem necessary, subject to removal by vote of the members of the board.

328 *Exhibit B*

4. The corporation hereby created shall possess the powers and be subject to the provisions contained in Article Second, title first, of the fifteenth chapter of the first part of the Revised Statutes so far as the same are applicable.

5. The said corporation may grant to students under its charge, diplomas or honorary testimonials, in such form as it may designate. It may also confer such literary honors, degrees and
329 diplomas, as are usually granted by any university, college or seminary of learning in the United States.

6. Diplomas granted by the said corporation shall entitle the possessor to the immunities and privileges allowed by usage or Statute to the possessors of like diplomas from any college or seminary of learning in the State.

7. The corporation shall be subject to the visitation of the Regents of the University of this State, in the same manner and to the same
330 extent as the various colleges in this State.

8. The corporation hereby created shall possess the powers and be subject to the provisions contained in the third title of the eighteenth chapter of the first part of the Revised Statutes so far as the same are applicable and have not been repealed.

9. The legislature may at any time alter or repeal this act.

10. This act shall take effect immediately.

Exhibit B 331

STATE OF NEW YORK. In Assembly March 17, 1846. This bill having been read the third time, and two-thirds of all the members elected to the Assembly voting in favor thereof, Resolved that the bill do pass. By order of the Assembly.

WM. C. CRAIN, *Speaker*

STATE OF NEW YORK. In Senate April 8, 1846. This bill having been read the third time, two-thirds of all the members elected to the Senate voting in favor thereof, Resolved that the bill do 332
pass. By order of the Senate.

A. GARDINER, *President*

Approved this 10th day of April, 1846.

SILAS WRIGHT

STATE OF NEW YORK
Secretary's Office

I have compared the preceding with an original law of this State on file in this office, and do hereby 333
certify that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto affixed the Seal of this office at the City of Albany the tenth day of April in the year of our Lord one thousand eight hundred and forty six.

(SEAL)

N. J. BENTON,
Secretary of State

334 *Exhibit B*

THE UNIVERSITY OF THE STATE OF NEW YORK

AMENDMENT *to Charter of St. John's College, Fordham*

Having received a petition made in conformity to law and being satisfied that public interests will be prompted by such action, the Regents, by virtue of the authority conferred on them, hereby amend the charter of St. John's College, Fordham, by changing its corporate name to

335 FORDHAM UNIVERSITY

And giving to its medical department the name of FORDHAM UNIVERSITY, SCHOOL OF MEDICINE; to its law department the name of FORDHAM UNIVERSITY, SCHOOL OF LAW; and to its collegiate department the name of FORDHAM UNIVERSITY, ST. JOHN'S COLLEGE.

In witness whereof, the Regents grant this amendment to charter no. 1808, under seal of the University, at the Capitol in Albany, March
336 7, 1907.

ST. CLAIR MCKELWAY,
Vice-Chancellor

A. S. DRAPER,
Commissioner of Education
Recorded and took effect 2:30 p. m.,
March 7, 1907.

Exhibit B 337

THE UNIVERSITY OF THE STATE OF NEW YORK
AMENDMENT *to Charter of Fordham University*

THIS INSTRUMENT WITNESSETH: That the Regents of the State of New York have amended the charter of Fordham University, located in the Borough of the Bronx, City of New York (which was chartered under the name of St. John's College, Fordham, by Chapter 61 of the Laws of 1846 of the State of New York, its corporate name having been changed to Fordham University by action of the Regents taken at their 338
meeting of March 7, 1907), by changing the name of its collegiate department now known as "Fordham University, St. John's College," to "FORDHAM UNIVERSITY, FORDHAM COLLEGE."

GRANTED November 19, 1931 by the Regents of the State of New York, executed under their seal and recorded in their office. Number 4057.

(SEAL) FRANK PIERREPONT GRAVES, 339
President of the University and Commissioner of Education

J. M. BYRNE,
Vice-Chancellor

340 *Exhibit B*

THE UNIVERSITY OF THE STATE OF NEW YORK
EDUCATION DEPARTMENT

AMENDMENT *to Charter of Fordham University*

THIS INSTRUMENT WITNESSETH That the Board of Regents for and on behalf of the Education Department of the State of New York has amended the charter of Fordham University—which was incorporated under the name of St. John's College, Fordham, by Chapter 61 of the Laws of
341 1846 of the State of New York, such charter having been amended by action of the Board of Regents on March 7, 1907, by changing the corporate name of the institution to

FORDHAM UNIVERSITY

And giving to its medical department the name of FORDHAM UNIVERSITY, SCHOOL OF MEDICINE, to its law department, the name of FORDHAM UNIVERSITY, SCHOOL OF LAW, and to its collegiate department, the name of FORDHAM UNIVERSITY, ST. JOHN'S COLLEGE, and further amended by the
342 Regents on November 19, 1931, by changing the name of the collegiate department from FORDHAM UNIVERSITY, ST. JOHN'S COLLEGE, to FORDHAM UNIVERSITY, FORDHAM COLLEGE—by specifying the principal location of the corporation as the city and State of New York and by authorizing the

Exhibit B 343

corporation to conduct institutional branches in the counties of Westchester, Dutchess and Putnam.

GRANTED December 16, 1955 by the Board of Regents for and on behalf of the State Education Department, executed under the seal of said Department and recorded therein. Number 6814.

(SEAL) JAMES E. ALLEN, JR., 344
President of the University and Commissioner of Education

JNO. P. MYERS,
Chancellor

Exhibit C. Annexed to Answer of Fordham University

Proposed Sponsorship Agreement between City of New York and Fordham University. 345

(Omitted by stipulation)

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Answer of Defendant-Intervenor Lincoln Center for the Performing Arts, Inc.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

347 Lincoln Center for the Performing Arts, Inc., defendant-intervenor, by its attorneys, Milbank, Tweed, Hope & Hadley, for answer to the complaint:

1. Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph First.

2. Denies each and every allegation contained in paragraph Third, except refers to the provisions of § 72-k of the General Municipal Law and Title I of the Federal Housing Act of 1949,
348 as amended, 49 U. S. C. § 1451, *et seq.* for the terms and effect thereof.

3. Denies each and every allegation contained in paragraphs Fifth and Sixth, except that for the terms and effect of the Plan of the Lincoln Square Urban Renewal Project it refers to the Plan as set forth in Exhibit A to the answer of defendants City of New York, et al., and except that for the terms and effect of the statutory provisions above mentioned it refers to the same.

Answer of Defendant-Intervenor Lincoln Center for the Performing Arts, Inc. 349

4. Denies each and every allegation contained in paragraph Seventh, except that for the terms and effect of the Plan it refers to the Plan as set forth in Exhibit A to the answer of defendants City of New York, et al., and except it admits on information and belief that each person willing to undertake redevelopment of a site within the Project area enters into a sponsorship agreement with the City of New York pursuant to which such sponsor agrees to bid a minimum price at public 350
auction for the particular site to be redeveloped, that if it is the successful bidder at said public auction it further agrees to use the site for the purposes set forth in the Project Plan, and the City of New York agrees to acquire the site by condemnation or otherwise, to sell the site at public auction and to convey the site to the sponsor if said sponsor is the successful bidder at the auction; and that said sponsorship agreements may be executed only after the Board of Estimate has approved the Project Plan and authorized the execution of sponsorship agreements. 351

5. On information and belief, denies each and every allegation contained in paragraph Eighth, except admits upon information and belief that the Committee on Slum Clearance is of the opinion that the obtaining of tentative sponsors for redevelopment of the Project area is the most feasible method of effectuating the Project Plan.

6. Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs Tenth and Eleventh, except on information and

352 *Answer of Defendant-Intervenor Lincoln Center for the Performing Arts, Inc.*

belief admits that defendant Moses received an offer from Fordham University to become the sponsor of the collegiate site and to bid at the public auction thereof after acquisition by the City of New York at a minimum price finally fixed at $7.00 per square foot, and that said offer was conditionally approved by defendant Moses subject to final approval by the Board of Estimate of the City of New York.

353 7. Denies each and every allegation contained in paragraph Twelfth, except on information and belief admits that Fordham University is an educational corporation conducted by a religious order of the Roman Catholic Church, that enrollment therein is not limited to students of the Catholic faith, and that courses in the Catholic religion are conducted in certain of its schools.

8. Denies that it has any knowledge or information sufficient to form a belief as to each and every
354 allegation contained in paragraph Thirteenth, except admits on information and belief that defendant Moses has announced advertisement of the solicitation of sponsorship bids for the sites in the Project area, and except on information and belief denies that if the collegiate site is acquired by the City of New York and sold at public auction in accordance with the Plan, Fordham University is the only possible bidder and the City of New York will be obligated to sell the collegiate site to Fordham University pursuant to the sponsorship agreement.

Answer of Defendant-Intervenor Lincoln Center for the Performing Arts, Inc. 355

9. Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph Fourteenth.

10. Denies each and every allegation contained in paragraph Fifteenth.

11. Denies each and every allegation contained in paragraph sixteenth, except admits that after submission of the Project Plan by the Committee 356
on Slum Clearance to the City Planning Commission and after public hearing held on September 11, 1957, at which certain persons objected to said Project Plan on various grounds as shown by the minutes of the said hearing, the City Planning Commission approved the Project Plan in a report dated October 2, 1957.

12. Denies each and every allegation contained in paragraph Seventeenth, except admits that after public hearings on October 25, 1957, at which 357
certain persons objected to said Project Plan on various grounds the Board of Estimate on November 26, 1957, adopted a series of resolutions approving the Project Plan and some of the sponsorship agreements, including that of Fordham University.

13. Denies each and every allegation contained in paragraphs Eighteenth, Nineteenth and Twentieth.

14. Denies that it has any knowledge or information sufficient to form a belief as to each and

358 *Answer of Defendant-Intervenor Lincoln Center for the Performing Arts, Inc.*

every allegation contained in paragraphs Twenty-first, Twenty-second and Twenty-fourth, except admits that the collegiate site includes 101 West 60th Street.

15. As to paragraphs Twenty-third and Twenty-fifth, repeats and realleges each and every denial hereinabove set forth pertinent thereto.

359 16. Denies each and every allegation contained in paragraphs Twenty-seventh and Twenty-eighth.

Wherefore, defendant-intervenor Lincoln Center for the Performing Arts, Inc. demands judgment dismissing the complaint, with costs.

Milbank, Tweed, Hope & Hadley,
15 Broad Street,
New York 5, N. Y.,
Attorneys for defendant-
360 intervenor Lincoln Center,
for the Performing Arts, Inc.

(Verified, December 12, 1957.)

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Defendants' Notice of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE, that upon the complaint, the answer, the affidavit of Robert Moses, duly sworn 362
to the 9th day of December, 1957, the affidavit of Robert Moses, duly sworn to the 4th day of December, 1957 heretofore submitted to this Court in opposition to plaintiffs' motion for a temporary injunction, and upon all the proceedings heretofore had herein, the undersigned will move before Special Term, Part III of this Court, to be held at the Courthouse thereof, located at 60 Centre Street, in the Borough of Manhattan, City of New York, on the 13th day of December, 1957, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order 363
and judgment pursuant to Rules 106, subd. 4, 112 and 113 of the Rules of Civil Practice (a) dismissing the complaint on the ground that it is insufficient in law and does not state facts sufficient to constitute a cause of action; (b) on the pleadings; (c) dismissing the complaint and granting summary judgment in favor of the defendants and (d) granting the defendants such other and fur-

364 *Defendants' Notice of Motion*

ther relief as may to the Court seem just and proper.

Dated: New York, December 9, 1957.

Yours, etc.,

PETER CAMPBELL BROWN,
Corporation Counsel,
Attorney for Defendants,
Office & P. O. Address,
365 Municipal Building,
New York 7, N. Y.

To:

HARRIS L. PRESENT, ESQ.,
Attorney for Plaintiffs,
1270 Sixth Avenue,
New York 20, N. Y.

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Affidavit of Robert Moses, Read in Support of Defendants' and Defendants-Intervenors' Motions and in Opposition to Plaintiffs' Motions

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

368

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT MOSES, being duly sworn, deposes and says:

1. This affidavit is submitted in support of the defendants' motion for summary judgment dismissing the complaint. The purpose of this affidavit is to set forth the facts established by documentary evidence or official records which demonstrate that the defense herein is sufficient as matter of law, that there are no material or relevant issues of fact raised by the pleadings, and that summary judgment should be granted to the defendants dismissing the complaint.

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2. In opposition to the plaintiffs' motion for a temporary injunction, an affidavit sworn to by me on the 4th day of December 1957 was submitted to the Court by the defendants. That affidavit is made part hereof as though fully set forth at length and I ask the Court to deem it as having been made both in support of defendants' instant

370 *Affidavit of Robert Moses*

motion for summary judgment and in opposition to the plaintiffs' motion for temporary injunction.

3. My first affidavit set forth at length the facts which in my opinion conclusively demonstrate:

(a) that schools, including schools of a denominational character, are a natural and frequently indispensable component of a planned community and, as such, cannot possibly have been intended to be excluded by the New York or Federal Con-
371 stitutions from a plan for community redevelopment which is part of a slum clearance and redevelopment; and

(b) that the procedures required by General Municipal Law, Section 72k, and the National Housing Act of 1949, as amended, as well as those which had been worked out by the Slum Clearance Committee for the processing and execution of slum clearance and redevelopment programs assure that no aid or gifts of property or public funds are made to any of the successful bidders for the land to be redeveloped under the program.

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ANALYSIS OF PLAINTIFFS' CONTENTIONS

(A)

4. The whole tenor of this action, as illustrated by the complaint and the affidavit of Mr. Dickstein submitted in support of the application for temporary injunction, appears to be that the Urban Renewal plan can only be upheld if Fordham University is affirmatively excluded from bidding at public auction equally with non-sectarian bidders. Mr. Dickstein concedes that if the defendants had

negotiated a sponsorship contract with Columbia University or some other nonsectarian educational institution there would be no constitutional objections to the Urban Renewal Plan and the acquisition of the site by condemnation. Let us follow this concession to its logical conclusion and see where it leads us. We would then have a Lincoln Square Renewal Project Plan and, among other things, a sponsorship agreement with Columbia University to bid at the public auction. The Board of Estimate would then approve the Plan, author- 374
ize condemnation of the site, and order the sale of the property at public auction after its acquisition. This, Mr. Dickstein concedes, would be constitutionally unassailable. If, at the public auction, New York University appeared for the first time and outbid Columbia University, it would follow from Mr. Dickstein's concession that sale of the property to New York University instead of Columbia would be constitutionally unobjectionable. But, says Mr. Dickstein for the plaintiffs herein, if Fordham University under this assumed state of facts were to appear for 375
the first time at the public sale and were to outbid Columbia University and New York University, we would have to reject the highest bid from Fordham University to avoid violating the Federal and State Constitutions. As a matter of fact, to point up the complete absurdity of the contentions made by the plaintiffs herein, we would have to reject Fordham for fear that the whole plan, the sponsorship contracts and the act of condemnation would all be invalidated.

5. Furthermore, if the contentions raised by the plaintiffs herein were found to be correct, no

376 municipality throughout the land could safely undertake the rehabilitation of a slum clearance project. Elsewhere, outside the City of New York, such projects are carried forward by the municipality acquiring the land, relocating its occupants, demolishing the buildings thereon and then, for the first time, seeking persons willing to redevelop in accordance with their project plan. (This practice is illustrated by the fact situations in many of the judicial decisions of other jurisdictions cited
377 in the legal memorandum of the Corporation Counsel.) Not until the moment of the receipt of the highest bid could any municipality know whether or not the plan on which it had worked was or was not constitutional.

6. Quite apart from the demonstration of the fallacy of the plaintiffs' contentions, there remain to be considered by this Court the principles laid down by the Court of Appeals and the Supreme Court clearly establishing that the right to the free exercise of religion is a constitutional right as important to our nation as that which prevents
378 governmental aid in establishment of religion. Whenever it is contended that a certain State act is in aid of the establishment of religion, the Court must be satisfied that the striking down of the proposed act will not destroy the right to the free exercise of religion. I am firmly convinced that the plaintiffs' success would deprive Fordham University or any other sectarian institution which might appear at the public auction of its right to compete on an equal footing with nonsectarian institutions and that such deprivation would be an impairment of the constitutional guarantee of the free exercise of religion.

(B)

7. Among other things, it is contended in the affidavit of Mr. Dickstein (p. 11) that "substantial benefit has been conferred upon Fordham merely by reason of the re-use restriction, for if it were not for such restriction, Fordham would necessarily be competing with other purchasers who might desire to acquire the site for housing or some other purpose."

8. This contention overlooks the fact that under Constitution Article 18, and General Municipal Law § 72-K, it is the duty of the Board of Estimate to provide for neighborhood replanning in connection with a slum clearance project. If the plaintiffs' suggestion—that the property should, after acquisition, be sold to the highest bidder for the use which brings the City the highest price—were to be followed, it would violate the constitutional and statutory purpose that recurrence of the slum conditions should be averted by a proper redevelopment plan. 380

The determination to clear an area of its slum conditions and the determination of the nature of the uses for which it is to be redeveloped are matters within the legislative discretion of the Board of Estimate of the City of New York. So long as the requirements of Section 72-k of the General Municipal Law are followed, no one may be heard to question the manner in which it is finally determined that the site shall be redeveloped. 381

9. I have been informed by the Corporation Counsel that the memorandum which was submitted on behalf of the defendants in opposition to

the application for temporary injunction herein contains the cases in this and in other jurisdictions which establish beyond question the validity of the resale of property acquired in furtherance of a slum clearance project to redevelopers under terms and conditions which insure the development of the property in accordance with the plan for its rehabilitation. I am informed as well that this Court will be asked to consider that memorandum in connection with the present motion. The cases I refer to will be found at pp. 13 through 20.
383 Among these cases are two upholding redevelopment plans which provide for redevelopment as collegiate sites: *Boro Hall Corp.* v. *Impelliteri*, (Long Island University) and *Bleecker Luncheonette Inc.* v. *Wagner* (New York University), cited at pp. 13-14 of the memorandum of the Corporation Counsel.

10. Where, as here, it has been determined that part of the project area shall be developed for collegiate purposes, it necessarily follows that said portion of the site, when acquired, must be resold
384 at public auction on terms and conditions which will guarantee the effectuation of the plan. Obviously, therefore, land for which the sponsors and others bid at the public auction cannot be considered in the same light as land which is sold without restrictions upon its use imposed by the grantor.

(C)

11. Paragraphs "Tenth" and "Eleventh" of the complaint allege that Fordham University originally agreed to become a sponsor and to bid at

the public auction at a minimum upset price of $5 per square foot, that this bid price was revised several times, and ultimately fixed at $7 per square foot The affidavit of Mr. Dickstein, sworn to November 27, 1957, attempts to amplify the allegations of paragraphs "Tenth" and "Eleventh" of the complaint. For the reasons advanced in my original affidavit of December 4th (p. 27, paragraph 24), to which the Court is respectfully referred, the fact that modifications were made in the minimum upset price to be bid by Fordham 386
under its sponsorship contract has no relevance to the constitutional issues which have here been raised. These appraisals are intended merely: (a) to provide a reasonable estimate on which to base forecasts of Federal and City costs; and (b) to establish a *minimum* upset price for the public auction. The price obtained at such public auction constitutes the fair re-use value of the property under the restrictions upon which it is sold.

12. As set forth in Mr. Dickstein's affidavit (p. 10), the Committee on Slum Clearance approved 387
an offer from Fordham University to become a sponsor upon a minimum upset price of $5 a square foot for collegiate reuse. Such acceptance was, of course, subject to the approval of the Board of Estimate and the Federal Housing and Home Finance Agency. As further indicated in Mr. Dickstein's affidavit (p. 10), the aforesaid approval was based upon the appraisal of the late George A. Hamm̃er showing the value of that portion of the site *restricted to collegiate reuse* to be $4.84 a square foot The records of my office do not contain any appraisal of the collegiate area at

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$8 a square foot. The sum of $8 a square foot for the proposed collegiate reuse was *not* based upon an appraisal of Mr. Hammer or upon any other appraisal (compare Dickstein's affidavit, p. 10). Instead, it was a recommended disposition price submitted by the Slum Clearance Committee in an interim project report to the Federal agency (See, Exh. A, annexed hereto, which is a true copy of the recommended disposition prices submitted by the Slum Clearance Committee to the Federal Agency on May 24, 1957). Such recommendation 389 of $8 a square foot was not related to the fair collegiate reuse value, but rather, was dictated by the limitations of the Federal and City funds available for financing the project. (See, Exh. B, annexed hereto, which is a true copy of an excerpt from a document on file in my office.) I might add that Fordham University never agreed to be a sponsor at a minimum upset price of $8 a square foot.

13. Thus, it is important to note that the minimum upset price of $7 a square foot for collegiate 390 reuse, finally approved by the Board of Estimate and the Federal Agency and accepted by Fordham University, is higher than every appraised value submitted with respect to the collegiate area. This fact insures that the minimum amount obtained by the City at the public auction will be greater than the fair reuse value estimated by every appraiser. It is also noteworthy that the appraisals of Crawford and Warsawer at $6.71 a square foot and $6.50 a square foot, respectively (Dickstein's affidavit, pp. 10 and 11) were based upon a reuse more valuable than collegiate use, i.e., housing use. Thus, the upset price of $7 which Fordham is pre-

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pared to bid at public auction is even in excess of the appraised values of the more valuable housing use. Finally, it is appropriate to observe that the foregoing procedures are no different from those applied in earlier Title I proceedings under which educational sites were acquired at public auction by New York University, Pratt Institute and Long Island University.

14. On the basis of the foregoing, I believe that the complaint herein has no merit and must be dismissed. The constitutional provisions which the plaintiffs claim to have been violated cannot possibly be distorted to mean that municipal slum clearance and redevelopment must refuse to recognize the need for denominational schools in a planned community. Such an interpretation would have a disastrous effect on sound community planning and would seriously impede the development of stable and desirable communities. It would also constitute a clear deprivation of the right to the free exercise of religion which is guaranteed by the State and Federal Constitutions.

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Wherefore, it is respectfully requested that defendants' motions be granted and that judgment be entered herein dismissing the complaint.

Robert Moses.

(Sworn to December 9th, 1957.)

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Exhibit A, Annexed to Affidavit of Robert Moses

LINCOLN SQUARE

RECOMMENDED DISPOSITION PRICES

Area	*Use*	*Sq. Ft.*	*$/Sq. Ft.*	*Sale Price*
1	Collegiate	320,230	8.00	$ 2,561,84
2	(Performing Arts	352,908	8.00	2,823,26
	(64-70 Columbus Avenue	23,854	—	1,500,00
395 3	Lot 51	2,510	7.0	17,57
a.	Fire House	12,251	6.79	83,18
b.	Lot 56	2,711	6.30	17,07
5	Housing	506,384	6.00	3,038,30
a.	Commercial	25,165	6.00	150,99
b.	Church	50,000	6.00	300,00
c.	School	40,000	6.08	243,20
	Playground	59,804	—	—
d.	Commercial	27,200	6.00	163,20
e.	Commercial	20,000	6.00	120,00
6	Housing	280,748	6.00	1,684,48
396 a.	Housing—Cooperative	53,050	4.00	212,20
				$12,915,33

May 24, 1957

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Exhibit B, Annexed to Affidavit of Robert Moses

CITY OF NEW YORK

OFFICE OF COMMITTEE ON SLUM CLEARANCE

Randall's Island
New York 35, N. Y.

Telephone TRafalgar 6-9700

May 1, 1957

REPORT TO MAYOR WAGNER
FROM COMMISSIONER MOSES 398

You have Mr. Cole's letter to me outlining the agreement which Tom Shanahan, George Spargo, Bill Lebwohl and I reached on Federal funds to enable us to proceed on a constructed, reliable basis with the urban renewal program in New York City. Under this agreement we will receive from the Federal Government an additional $5,500,000 before July 1, 1957, and 10 percent of the Federal authorization made by Congress for the year beginning July 1, 1957. It is expected that this authorization will be in the neighbor- 399
hood of $250,000,000, of which New York City would receive $25,000,000.

The application to specific projects of these funds discussed with Mr. Cole and his associates and which formed the basis of the agreement made with him is as follows:

1. Lincoln Square will be allocated a total of $30,000,000 in Federal grant monies. This will necessitate primarily elimination from the Lincoln Square plan of the section along

400 *Notice of Motion of Defendant-Intervenor Fordham University for Summary Judgment*

Broadway from 65th to 70th Street, originally set aside for theatrical and commercial development. It will necessitate some increase in the price to be paid for the land by sponsors seeking to develop the housing, educational and performing arts activities. This will require about $5,500,000 of the funds to be made available. The specific changes in land prices required in the original plan to
401 keep within this total are an increase from $5 to $8 per foot to be paid by Fordham University and the Performing Arts Center. A prorata reduction in overhead expenses can also be effected.

• • •

/s/ Robert Moses
Chairman

Notice of Motion of Defendant-Intervenor Fordham University for Summary Judgment

402

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

Sirs:

Take notice that defendant-intervenor Fordham University will move this Court at a Special Term, Part III thereof, to be held in and for the County of New York at the County Court House therein, on December 13, 1957, at 10 A. M., as follows:

Notice of Motion of Defendant-Intervenor Fordham University for Summary Judgment 403

I. For an order granting judgment on the pleadings pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, dismissing the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

II. Upon the pleadings herein and the affidavit of Laurence J. McGinley, verified December 10, 1957, annexed hereto, for an order granting summary judgment pursuant to Rule 113 of the Rules 404
of Civil Practice dismissing the complaint.

III. For such other and further relief as may be proper.

New York, N. Y.,
December 10, 1957.

Yours, etc.,

SAXE, BACON & O'SHEA,
Attorneys for Defendant-Intervenor, 405
Fordham University,
20 Exchange Place,
New York, 5.

To:

HARRIS L. PRESENT, Esq.,
Attorney for Plaintiffs,
1270 Sixth Avenue,
New York, N. Y.

HON. PETER CAMPBELL BROWN,
Corporation Counsel,
Attorney for Defendants City of
New York, et al.,
Municipal Building,
New York 7, N. Y.

406 **Affidavit of Laurence J. McGinley, Read in Support of Defendants' and Defendants-Intervenors' Motions and in Opposition to Plaintiffs' Motions**

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

407 State of New York }
County of New York } ss.:

Laurence J. McGinley, being duly sworn, says:

1. I am the President of Fordham University (hereinafter sometimes called "the University"), and have been President since 1939.

I am, at the present time, also President of the Association of Colleges and Universities of the State of New York; Secretary of the Committee on Institutions of Higher Education of the Middle States Association (the regional accrediting Asso-
408 ciation of this area of the United States); a Director of the New York Higher Education Assistance Corporation (a non-profit corporation created in 1957 by the New York State Legislature to improve the higher educational opportunities of New York residents by lending funds to such persons to assist them in meeting their expenses of higher education); and also a member of other educational associations.

2. I make this affidavit in support of the University's motion, made pursuant to Rule 113 of the Rules of Civil Practice, for summary judgment dismissing the complaint.

3. This action was commenced on December 2, 1957. The University was not made a party defendant. By order dated December 9, 1957 the University was permitted to intervene as a party defendant and to serve an answer. The University served a verified answer on that date.

4. By this action plaintiffs seek to have declared null and void, illegal and unauthorized in violation of Article XI Section 4 and Article I, Section 7 of the Constitution of the State of New York and further in violation of the Fourteenth Amendment of the Constitution of the United States, the action of the Board of Estimate of the City of New York taken on November 26, 1957 approving the Lincoln Square Urban Renewal Project Plan, the capital grant contract thereunder, acquisition of the project area by condemnation or otherwise and the sale of the project area in accordance with the Project Plan; and also seek to enjoin the defendant City and its agencies from executing or carrying out the terms of the sponsorship and redevelopment contract with the University and other action to be taken under the Project Plan.

5. The University formally opened in what is now the Borough of the Bronx on June 24, 1841. It was then known as St. John's College. On April 10, 1846, the Legislature of the State of New York by Special Act incorporated the University as an educational corporation (Chapter 61, Laws of 1846, a copy of which is annexed to the University's answer). On March 7, 1907, its name was changed to Fordham University.

412 *Affidavit of Laurence J. McGinley*

6. The University comprises nine colleges and schools. Fordham College of Arts and Sciences, the Graduate School of Arts and Sciences and the College of Philosophy and Letters, are liberal arts institutions. Its professional schools are the School of Law, the College of Pharmacy, the School of Social Service, the School of Education, and the School of Business. The School of General Studies provides for adult education.

The School of Social Service is located at No. 134 East 39th Street, Borough of Manhattan, New
413 York City; and the Schools of Law, Education, Business and General Studies are located at No. 302 Broadway, Borough of Manhattan.

7. The University has more than 800 members on its faculty and administrative staff; and each academic year more than 13,000 students attend its classes.

It is an established fact that, over the years, a steadily increasing percentage of youth has continued education beyond high school. It has been estimated that there were 73,040 high school gradu-
414 ates in the New York City Metropolitan Area in 1956; and that this figure will grow to 132,331 in 1965 (State Education Department Study—"Needs and Facilities in Higher Education in New York State" (pp. 67-8, March 1957). The impact of this increase in high school graduates on the colleges and universities in New York City is obvious.

The Deans of the University and I estimate that over 18,000 students will be attending Fordham's classes in the academic year 1965.

8. For over 115 years Fordham has served the educational needs of the New York Metropolitan area, accepting students of all races, colors and creeds. During its entire existence no applicant has ever been denied an opportunity for a Fordham education because of race, creed, color or national origin.

It is the intention of Fordham to continue that policy and, indeed, if the University is the successful bidder, Section 501 of Article V of the proposed sponsorship contract between the City and Fordham (copy annexed to Fordham's answer herein) provides: 416

> "The Sponsor shall not discriminate against or segregate any person seeking accommodations in any structure in the Collegiate Site because of that person's race, color, religion, national origin or ancestry."

This provision is in accord with the policy and traditions of Fordham and will be strictly observed in the event that Fordham is the successful bidder at the proposed auction sale. Since the 417
University does not maintain a detailed record of the religious affiliations of its students, I am unable to state precisely the number who are affiliated with various particular religious bodies, but I can state of my own knowledge that a substantial number of Fordham students, graduates and faculty, including those of the schools proposed to be located at Lincoln Square, are not of the Catholic faith and that many races, colors, creeds and national origins are represented in those schools.

418

9. More and more the future of our country will depend on educational opportunity for the boys or girls who must live at home while going to school so that they may, at least in part, work their way through. The University is permanently dedicated to serve such youth right here in New York City. More than fifty years ago for the benefit of those who could neither reside on the campus nor travel to it and especially for those who could only attend college on a part-time basis, Fordham located schools in the Borough

419

of Manhattan. At the present time over 4500 young men and women attend these schools, undergraduate and graduate, day and night, Saturdays and during the summers. Location in Manhattan makes it possible to get to school from home and work. All of these schools directly serve the community of the City of New York. For over a half a century the University's School of Law has graduated outstanding students and fed them into the life-stream of New York City. Business firms seek the graduates of the University's School of Business. The School of Edu-

420

cation prepares expert, devoted and direly needed teachers for our New York City school system. The School of Social Service—a school of human welfare—is the third largest of its type in the United States supplying one out of every five professionally trained social workers in the welfare agencies of this City. It is a school where every race, color and creed join together in the conviction that the social adjustment of human lives merits the skill that comes only from thorough training. The School of General Studies offers the opportunity to men and women to fur-

ther the training interrupted in their youth and deepen and enrich the lives which they now lead.

These schools serve our community well. In turn they must be readily accessible to their students—to the law clerk hurrying to class, to the employee taking business courses at night, to the future teacher practicing teaching in the local public school and to the graduate student working at a welfare agency to learn the art as well as the theory of social service.

Without including the adults registered in the School of General Studies, the other downtown schools enroll at the present time some 4569 students. The Deans and myself estimate that by 1965 their annual enrollments will increase to approximately 7000 or an increase of approximately 53%, as follows: 422

	57-8	1965
School of Education	2828	4500
School of Law	696	1000
School of Business	788	1200
School of Social Service	257	300

423

10. If Fordham is the highest bidder at the public auction of the collegiate site, it will be in a position to consolidate these four downtown schools in one location and enlarge and modernize their facilities to better meet and serve the future educational and cultural needs of the youth of our City. The University's participation in the Lincoln Square Urban Renewal Project will enable it—just as in the cases of New York University, Long Island University and Pratt Institute's participation in slum clearance projects—to achieve

these goals and at the same time to contribute to the City's primary and overall purpose in undertaking this project—that of ridding the City of substandard and insanitary areas and assuring against their recurrence.

11. Fordham seeks no grant, aid or maintenance from the City of New York herein nor does it ask to be accorded any special rights or privileges. It merely desires to participate in this Project by contracting with the City on the basis
425 of an exchange of valuable considerations. It never contemplated, intended or in fact is to receive any grant, aid or maintenance from the City or from the Federal Government if it is the successful bidder. It desires to exercise its corporate powers to contract by bidding in at the public auction for the proposed collegiate site as might any other educational institution. I have been advised by counsel, and I believe, that Fordham's participation in the Project is entirely legal and is not in violation of any provision of the Constitution of the State of New York or of the United
426 States.

12. I am also advised by counsel, and I believe, that this action has no merit. No triable issue of fact is presented by the pleadings. All material questions of fact are admitted.

LAURENCE J. MCGINLEY.

(Sworn to December 10, 1957.)

427

Affidavit of Edgar B. Young, Read in Support of Defendants' and Defendants-Intervenors' Motions and in Opposition to Plaintiffs' Motions

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

428

State of New York }
County of New York } ss.:

Edgar B. Young, being duly sworn, says:

I am Secretary of Lincoln Center for the Performing Arts, Inc., defendant-intervenor herein (hereinafter called "the Center"), and make this affidavit joining in and supporting the motion of defendants City of New York et al. to dismiss the complaint and for other relief, and opposing plaintiffs' cross-motion for summary judgment.

429

The Center is a New York, non-profit, membership corporation having its principal place of business at 10 Columbus Circle, New York, N. Y., formed exclusively for charitable and educational purposes, including the promotion of the musical and performing arts.

The Center has duly entered into a sponsorship contract with the City, copy of which is hereto annexed as Exhibit A, providing in material substance that after condemnation by the City the Center will bid at public auction at least a specified minimum price for a specified site within the Lincoln Square Urban Renewal Project area; that if the Center's is the highest bid the City will ac-

cept it and convey the site to the Center upon payment therefor; and that thereupon the Center in accordance with specified plans will relocate tenants, demolish all structures now on the site, and construct new buildings, including a concert hall to be a home for the New York Philharmonic-Symphony Society and an opera house to be a home for the Metropolitan Opera Association. The contract is subject to approval by the Federal Government and execution and delivery of a Federal capital grant contract pursuant to the provisions of the Federal Housing Act of 1949, as amended, 49 U. S. C. § 1451, *et seq.*

Accordingly, defendant-intervenor Lincoln Center for the Performing Arts, Inc. joins in and supports defendants' aforesaid motion and urges that it be granted and that plaintiffs' cross-motion be denied, all for the reasons set forth in the affidavits of Robert Moses, sworn to December 4 and 9, 1957, submitted herein.

EDGAR B. YOUNG.

(Sworn to December 12, 1957.)

Exhibit A, Annexed to Affidavit of Edgar B. Young

Proposed Sponsorship Agreement between City of New York and Lincoln Center for the Performing Arts, Inc.

(Omitted by stipulation.)

433

Plaintiffs' Cross Notice of Motion for Summary Judgment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Sirs: 434

PLEASE TAKE NOTICE that upon the complaint, the answer of defendants, the answer of defendant-intervenor, the affidavit of Sidney Dickstein, duly sworn to the 27th day of November, 1957, heretofore submitted to this Court in support of plaintiffs' motion for a temporary injunction, and upon all the proceedings heretofore had herein, and upon defendants' motion for an order dismissing the complaint and granting summary judgment in favor of the defendants, which motion was made returnable at Special Term Part III of this Court on the 13th day of December, 1957, at 10:00 435
o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard; the undersigned will make a cross-motion pursuant to Section 117 of the Civil Practice Act on the aforesaid day and time for an order pursuant to Rule 113 of the Rules of Civil Practice for summary judgment in favor of the plaintiffs on their causes of action for declaratory judgments and for such

436 *Plaintiffs' Cross Notice of Motion for Summary Judgment*

other and further relief as to the Court may seem just and proper.

Dated: New York, New York,
December 10, 1957.

HARRIS L. PRESENT,
Attorney for Plaintiffs,
Office & P. O. Address,
1270 Sixth Avenue,
437 New York 20, New York.

To:

PETER CAMPBELL BROWN, Esq.,
Attorney for Defendants,
Municipal Building,
New York 7, New York.

SAXE, BACON & O'SHEA, Esqs.,
Attorneys for Defendant-Intervenor,
20 Exchange Place,
New York 5, New York.

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439

Affidavit of Sidney Dickstein, Read in Support of Plaintiffs' Motions and in Opposition to Defendants' and Defendants-Intervenors' Motions

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[Same Title]

440

State of New York }
County of New York } ss.:

Sidney Dickstein, being duly sworn, deposes and says:

I am an attorney associated with Harris L. Present, attorney for the plaintiffs herein, and submit this affidavit in support of the plaintiffs' motion for a temporary injunction and plaintiffs' motion for summary judgment for the declaratory relief demanded in the complaint. This affidavit is further submitted in opposition to the motions of defendants and defendant-intervenor for judgment on the pleadings and summary judgment. 441

I am fully familiar with the instant proceeding as well as the facts relating thereto, such facts being obtainable through public records or information available to the public at large.

The defendants' affidavits in opposition to plaintiffs' motions and in support of defendants' motions to dismiss and for summary judgment are predicated upon assumptions which, although they

may be generally true for Title I projects other than the Lincoln Square Project, are not based upon the actual facts relating to the matter in dispute.

Defendants regard Fordham University's participation as the sponsor of the collegiate site as purely incidental to the processing of the Lincoln Square Urban Renewal Project and upon that assumption predicate the following propositions:

1. There is nothing in the Plan which requires
443 the redeveloper of the collegiate area to be a sectarian institution.

2. No benefit has been conferred upon Fordham by reason of the site restriction to collegiate use.

3. Fordham's position in the Lincoln Square Urban Renewal Project is merely that of a guaranteed bidder for the collegiate site.

4. Because any college or university may bid competitively for the collegiate site, the public
444 bidding requirements of Section 72-k of the General Municipal Law will in and of themselves result in an ascertainment of market value.

5. No one at this time can predict whether or not Fordham University will be the successful bidder for the collegiate site.

6. Plaintiffs' arguments can only be sustained if the court is prepared to hold that under no circumstances can a religious organization ever participate in a Title I project.

Clearly, if the facts here show that the site restriction to collegiate use was adopted solely for the benefit of Fordham University and that the public bidding requirement is meaningless because of that site restriction—none of defendants' contentions can be sustained. Such are the facts of the Lincoln Square Urban Renewal Project.

When the Lincoln Square Urban Renewal Project was first proposed, discussions were held with persons or organizations who might be willing to purchase and redevelop a portion of the project area. After such discussions and on October 17, 1955, preliminary bids were closed for proposed tentative sponsorship. Thereafter, persons or organizations interested in participating as sponsors were advised that tentative sponsors had been selected but that anyone could participate at public auction. See Exhibits A, B, C and D appended hereto and made a part hereof. 446

On May 28, 1956, the Committee on Slum Clearance issued a report to Mayor Wagner and the Board of Estimate regarding the proposed Lincoln Square Project. In that report it was stated: 447

> "The redevelopment recommended by the Committee proposes the inclusion of an educational site for the midtown college and campus of Fordham University * * *." *Id.*, at p. 3.

The Site Plan included in that report shows Fordham University as the occupant of the area bounded by West 60th Street, Columbus Avenue, West 62nd Street and Amsterdam Avenue. The Site Plan makes no reference to a "collegiate site" as such, but refers only to Fordham Uni-

versity. Elsewhere in the report, it was indicated that the Committee had received an offer of $5 per square foot from Fordham University and the proposed development description at p. 13 specifically states:

> "Within the project limits, starting at West 60th Street and extended to West 62nd Street is the Fordham University Downtown School, which comprises a number of departments attended by day students. Here, adjoining
449 an area devoted to music, art and the opera, will be erected a harmonious group of school buildings which will daily accommodate over 4,000 students. These will comprise the schools of Law, Education, Business and Social Service. About 175,000 square feet of floor space will be needed for this purpose. With buildings of three and four stories to provide this space it will be possible to create a landscaped campus in mid-Manhattan."

The numerical land use analysis was set forth
450 at p. 14 of the report and showed that Fordham will occupy 305,126 square feet of space. There is no mention in the redevelopment plan of a collegiate site other than the specific references to Fordham University. There was not even a suggestion that any other collegiate institution could participate.

Thereafter and on June 29, 1956, James Felt, Chairman, City Planning Commission, sent a communication to Robert F. Wagner, as Chairman of the Board of Estimate, recommending approval of further processing of the proposed Lincoln Square Urban Renewal Plan with the Federal

Urban Renewal Administration, which communication said in part:

> "The proposed redevelopment plan includes the provision of an educational site for the Fordham University Downtown Center comprising the schools of Law, Education, Business and Social Service." (See Exhibit E, Minutes of Board of Estimate, Calendar No. 139, July 26, 1956.)

On September 27, 1956, the further processing 452
of the proposed urban renewal plan with the inclusion of Fordham University, based upon the communication from the Chairman of the City Planning Commission and the Report of May 26, 1956, of the Committee on Slum Clearance, was approved by the Board of Estimate and upon its approval the Mayor, as Chairman of the Board of Estimate, issued a statement relating to relocation which stated in part:

> "We have already been assured by Fordham University and by the Music and Art sponsors of their full cooperation toward an 453
> orderly, humane and thoroughly adequate relocation program."

Thereafter an action was commenced against the defendants herein by taxpayers and others seeking to enjoin the further processing of the Lincoln Square Urban Renewal Project on the basis of Fordham University's participation in that project. (*Lochner v. City of New York*, Supreme Court, New York County, Index No. 15014/56).

454 A legal challenge having been made to Fordham University's designation as a sponsor, on information and belief, the Committee on Slum Clearance advised Skidmore, Owings & Merrill, coordinating architects for the project, to delete the name of Fordham University from the site plan and to substitute instead the word "institution" or "collegiate site" or some other euphemism. Similar instructions were given for the deletion of the name of St. Matthew's Roman Catholic Church, another challenged sponsor, and substi-
455 tution of the word "institution." The coordinating architects complied with such instructions and in a relocation brochure dated January 14, 1957, issued by the Committee on Slum Clearance, the Site Plan map set forth at pp. 4-5 of that brochure substituted the word "Institution" for the words "Fordham University," and the word "Institution" for the words "St. Matthew's Roman Catholic Church," but the building delineations formerly shown for Fordham University and St. Matthew's remained the same. In that brochure, for the first time, the words "Collegiate
456 Center" were used in substitution for "Fordham University" in the cost estimate set forth at page 10. When the Site Plan was reproduced as an appendix to the Report of the City Planning Commission on the Lincoln Square Urban Renewal Project, dated October 2, 1957, the buildings of Fordham University were designated both as "Fordham University" and "educational units" and the building for St. Matthew's Roman Catholic Church was no longer designated as "institution," but instead merely "church." See Exhibit B, appended to the affidavit of Sidney Dickstein dated November 27, 1957.

In spite of this history of predestination, defendants contend that the site restriction for collegiate use was not adopted with Fordham University specifically in mind and that at public auction some other college or university may very well outbid Fordham. This contention, however, is in direct conflict with the statement of William Lebwohl, Director of Slum Clearance, at the public hearing before the Board of Estimate held on the 25th day of October, 1957. Mr. Lebwohl was asked whether or not any other colleges or universities had been approached regarding sponsorship of the collegiate site and he replied that the Committee on Slum Clearance had contacted other schools and universities but that none of them was interested in participating. 458

The factual background of the Lincoln Square Urban Renewal Project leads to the inexorable conclusion that the use restriction to collegiate purposes has been adopted specifically with Fordham University in mind and for its specific benefit. It is a matter of public knowledge that a university cannot acquire a new campus on the spur of the moment. A building fund must be raised; plans for expanding facilities and faculty must be made; years of planning are required. It is inconceivable for another college or university to suddenly appear at public auction and outbid Fordham for the property. Yet it is upon such a strained presumption that defendants predicate their defense. 459

The Issue Before the Court

The affidavit of Robert Moses sworn to the 4th day of December, 1957 states: "The plaintiffs have raised the following constitutional question:

460 Do the Federal and State Constitutions require that sectarian institutions be excluded from a neighborhood or community which is being replanned and reconstructed as part of a slum clearance and redevelopment project?"

Plaintiffs deny that this is the issue before the Court. There are many ways in which a sectarian institution can properly and legally be included within a neighborhood or community being redeveloped pursuant to Title I of the National Housing Act. Only in the City of New York are
461 Title I projects conducted in the manner employed by the Committee on Slum Clearance. Elsewhere, a redevelopment plan is adopted without regard to and without the solicitation of definite sponsors. Thus, although site restrictions may be imposed for housing, educational purposes, community facilities, etc., such restrictions are not predicated upon predetermined utilization by a specific redeveloper. Under this methodology, if a site restriction is adopted for general community facilities, clearly a church or parochial school could participate in public auction and, if it is the highest
462 bidder, could and would be the redeveloper. The objectionable feature of the Lincoln Square Urban Renewal Project is that the site restriction to college use has been adopted solely upon the desire and agreement of Fordham University to erect a Downtown Graduate Center on that site. Thus the issue is limited to the particular facts before the Court, and because this state of facts is *sui generis*, no rule of general exclusion results and speculative consequences are irrelevant.

Parenthetically, however, plaintiffs believe that a site restriction in a Title I project to use by

churches or parochial schools only, might very well be invalid, but on the other hand no objection, constitutional or otherwise, could be made against a broader site restriction which would permit churches, clubs, community recreation centers, etc. to bid against one another. Under such circumstances, a church, if it is the highest bidder, could redevelop for its own sectarian purposes.

THE RESTRICTIVE USE

464

The affidavit of Robert Moses, sworn to the 4th day of December, 1957, seeks to create doubt as to the narrowness of the use restriction by referring to Paragraph 302 of the sponsorship contract between the city and Fordham University, annexed to that affidavit as Exhibit B. The affidavit points to the contractual provision that the site plan included within the contract is only one of the "possible" plans and is not necessarily the plan to be finally utilized for the project. This provision of the sponsorship contract means nothing more than that Fordham may, with the consent of the Committee on Slum Clearance, change the building layout for the site. But the contract, as well as the Conditions of Sale, makes it clear that a collegiate institution and only a collegiate institution can meet the site plan restrictions. Certainly if any other college institution planned or intended to compete for the collegiate site, this fact would already have been revealed. But instead of facts, the defendants offer vain conjecture.

465

Defendants seek to make much of the withdrawal of St. Matthew's Roman Catholic Church and the substitution of the American Red Cross

466 *Affidavit of Sidney Dickstein*

as the redevelopment sponsor of the institutional area. The institutional area is a site of 50,000 square feet restricted only to the extent that it must be redeveloped by an institutional user. There undoubtedly are hundreds of institutions in the City of New York who may appear at public auction and outbid the American Red Cross for the site. But there is not a single college or university in the City of New York or elsewhere that has shown the slightest interest in the purchase of the collegiate site which consists of more than
467 300,000 square feet. When defendants attempt to equate the institutional site with the collegiate site and insist that Fordham University can be substituted "with equal facility with respect to the educational area", their lack of candor is apparent.

The use restrictions in the Lincoln Square Urban Renewal Project have been questioned by the Administrator of the Federal Housing and Home Finance Agency. On July 25, 1957, Albert M. Cole, the Housing Administrator, wrote to Mayor Robert F. Wagner in reference to this project
468 and stated in part:

> "The point at issue concerns the determination of fair reuse value as required by Title I of the Housing Act of 1949 of lands to be sold to redevelopment sponsors in the Lincoln Square project area. As you probably know, this project is still in planning and has not yet been put under Federal capital grant contract. About six months ago, Mr. Moses's staff was advised that this Agency would require an appraisal by appraisers selected by the Agency, in addition to the usual two

appraisals to be submitted by the Committee on Slum Clearance. We have taken this position because of deficiencies in the first appraisal submitted by the Committee, the large amounts of money involved in the Lincoln Square project, and nation-wide public concern that a religious institution might be publicly subsidized by the sale of land for its use at less than fair value. *Moreover, the project proposals do not appear to assure the broad competition for the project sites which would otherwise tend to make certain that fair value would be determined in the market place.*" [Emphasis supplied] 470

Because of the concern of the Federal Housing Administrator, new and higher appraisals were obtained and the price to Fordham was increased. But even then, the price was the product of negotiations and is not the basis for the ascertainment of market value.

THE NATURE OF SUBSIDY

Defendants contend that no subsidy will be received by Fordham University as the result of Fordham's acquisition of the collegiate site. Defendants' contention in this regard is partially based upon the proposition that the fair re-use value and fair market value of the site for use as a collegiate area will be automatically determined by the resale price arrived at through public auction pursuant to the provisions of General Municipal Law, Section 72-k. Parenthentically, it should be noted that the terms "fair re-use value" and "fair market value" are hardly 471

synonomous. Market value is the price at which a seller would be willing to sell and a buyer would be willing to buy. If Fordham University decided that it wished to assemble a parcel of 300,000 square feet in midtown Manhattan, it would of course have to arrive at negotiated purchase prices with the various owners of portions of that parcel. The fact that Fordham intended to use the site strictly for educational purposes would in no wise affect the price which would be asked by private owners of realty. Fordham
473 would have to pay the price that such owners would consider proper market value without regard to the nature of re-use. Undoubtedly, certain owners of realty would insist on far more than fair market value and Fordham might be compelled to pay far more than fair market value if it desired to assemble a contiguous plottage of this size. Even if Fordham paid the City of New York the full cost of acquisition for the collegiate site, it would nevertheless be aided by the public power of condemnation which prevents a property owner from obtaining more than fair market
474 value.

But, again considering the presumed position of Fordham as a private purchaser, it would, after acquisition, have to bear the cost of vacating the acquired buildings and demolishing them. It would, of course, receive rental income from the tenants in such buildings during the time between acquisition and vacation, but the rental income which it would receive would be earned on the basis of a capital investment equivalent to or greater than the value of the land and the value of the buildings as rentable structures. Defendants state that Fordham University will be obligated by its agreement with the City to bear the

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cost of tenant relocation and building demolition. If Fordham, however, stood in the position of a private purchaser, it would bear the same cost. Indeed, Fordham's position as a Title I redeveloper is even better than would be its position as a private purchaser, for during the period prior to relocation it will receive rental income from the property, but such rental income will be earned upon a capital investment of less than one-half of the fair market value of land and buildings as determined by the estimates of the Committee on Slum Clearance of the cost of acquisition by condemnation. Thus, even in this regard, what defendants urge as a disadvantage to Fordham is instead a substantial advantage.

476

The nature of subsidy implicit in Title I projects becomes readily apparent when we examine the facts relating to other portions of the Lincoln Square Urban Renewal Project. The appraisers engaged by the Committee on Slum Clearance determined that the best commercial use to which the Lincoln Square site could be put is housing, and the appraisals were based upon such a presumed use. The housing sponsor of the housing site in the Lincoln Square Urban Renewal Project has agreed to pay for the property to be acquired by it the same price per square foot as Fordham University, namely, $7.00 per square foot. Nevertheless, the estimates of the cost of acquisition heretofore made by the Committee on Slum Clearance show an approximate over-all cost of acquisition averaging approximately $17.00 per square foot. There will, therefore, be an estimated differential between the cost of acquisition and the resale price of approximately $10.00 per square

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478 *Affidavit of Sidney Dickstein*

foot. Such a differential is subsidy. It can be called by no other name. Although such subsidy may carry out the purposes of Title I of the National Housing Act of 1949 as amended, and promote the public purpose of slum clearance, that purpose is being achieved only because the Congress intended to subsidize private interests in order to make possible the rehabilitation of substandard areas. That a benefit is conferred upon private interests to achieve such public purpose is undeniable. Defendants merely confuse the
479 issue when they seek to justify the subsidy to Fordham as the achievement of public purpose. For even although the benefits to private interests may be purely incidental, Fordham University is constitutionally precluded from receiving even an "incidental benefit."

THE USE OF CREDIT

The sponsorship contract between Fordham and the City of New York, Exhibit B to the affidavit of Robert Moses, sworn to the 4th day of
480 December, 1957, provides in Paragraph 102 at page 4 for a purchase money mortgage of 65% of the purchase price to be given by Fordham as mortgagor to the City of New York as mortgagee, for a term of five years, with interest at the rate of 5% per annum, payable quarter-annually. I have been advised that this is the usual term of sale for Title I sites in the City of New York. Completely independent of any other consideration, however, the extension of credit to Fordham University authorized by the sponsorship contract is unconstitutional and invalid.

Article 11, Section 4 of the Constitution of the State of New York prohibits such an extension of credit to a denominational school and although the city may sell on such terms and conditions as it may desire to other sponsors, it cannot extend credit to Fordham University. Again, it must be emphasized that benefits which others may receive cannot be granted by government to religious institutions. This is in no way violative of the First Amendment to the Constitution of the United States, nor does it deny religious organizations equal protection under the law. The 482
cases cited in plaintiffs' memoranda show beyond any question that although a state may provide grants-in-aid and give benefits to secular private organizations, if such grants in-aid or benefits are in the public interest, it cannot give aid to religious organizations. If the doctrine of separation of church and state means anything, it means at least this.

THE DENOMINATIONAL CHARACTER OF FORDHAM UNIVERSITY

483

Plaintiffs do not deny that Fordham University is open to students of all faiths. But the answers of the defendants and the defendant-intervenor show on the pleadings that Fordham University is an institution prohibited from receiving aid, subsidy or maintenance by Article 11, Section 4 of the Constitution of the State of New York. Paragraph 7 of the answer of defendant-intervenor, Fordham University, states:

> ". . . . that Fordham University is an educational corporation, incorporated by Special Act of the Legislature of the State of New

484 *Affidavit of Sidney Dickstein*

York (Chapter 61 Laws of 1846, * * *) that said university is conducted by members of the Society of Jesus, a religious order of the Roman Catholic Church; that enrollment therein is not limited to the students of the Catholic faith; and that courses in the Catholic religion are conducted in certain of its schools."

485 Paragraph 7 of the answer of defendants City of New York and officials of the City of New York, makes the same admissions.

Article 11, Section 4 of the State Constitution prohibits aid "to any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." The admissions that Fordham is a university conducted by members of the Society of Jesus, a religious order of the Roman Catholic Church, and that courses in the Catholic religion are conducted in certain of its schools, brings it unquestionably within the constitutional prohibi-
486 tion.

Moreover, even in the absence of such specific language, Fordham University is a sectarian school within the meaning of the First Amendment to the Constitution of the United States as it has been consistently interpreted by the courts.

THE UNSEVERABLE NATURE OF THE LINCOLN SQUARE URBAN RENEWAL PROJECT

The defendants maintain that even if Fordham University's participation as a sponsor is held to be invalid and unconstitutional, this in no wise

affects the balance of the project. This contention, however, ignores the legal prerequisites to the project's validity.

Section 72-k of the General Municipal Law provides:

> "The prior consent of the city planning commission or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based 488
> upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area."

The Report on Lincoln Square Urban Renewal Plan and Project of the City Planning Commission dated October 25, 1957 (Exhibit C to defendants' answer) shows that the City Planning Com- 489
mission arrived at its conclusion that the project area was substandard through consideration of the character of the area in its entirety. There were no findings that any individual portion is necessarily substandard. The finding that the area is substandard is of course an over-all determination which may be made in spite of the fact that certain individual structures within the area or even all of the structures in a substantial portion of the area may be standard or above standard. Similar findings as to substandard character of the entire area were made by the Board of Estimate prior to its final approval of the project.

490 Moreover, neither the City Planning Commission nor the Board of Estimate could have approved the renewal plan, providing as it does for a collegiate site, unless they relied upon Fordham's sponsorship of the collegiate site. The defendants' prior statements demonstrate that neither the City Planning Commission nor the Board of Estimate would have approved such a site restriction except for the assurance of Fordham's sponsorship. Without such sponsorship, a collegiate reuse restriction would be clearly arbi-
491 trary and capricious and would result in no redevelopment at all. If the Court declares Fordham University to be an ineligible sponser, but nevertheless approves the renewal plan with its inclusion of a collegiate site, it would be substituting its own judgment for the prior administrative and legislative determinations by the City Planning Commission and the Board of Estimate.

Furthermore, if, as defendants urge, the Court considers the entire project as being severable into its component parts of housing, performing arts, education, etc., it would be necessarily mak-
492 ing its own determination as to the substandard character of the individual parts, a power and responsibility which is statutorily and exclusively granted to the City Planning Commission and the Board of Estimate. In other words, no one can presume that the project area, excluding the collegiate site, would necessarily have been found to be substandard by the City Planning Commission and the Board of Estimate. Clearly, on the record herein, there has never been such a finding and such a finding is a mandatory statutory prerequisite to further processing.

CONCLUSION

Defendants place their heaviest reliance upon the public bidding requirements of Section 72-k, General Municipal Law, to demonstrate that Fordham University will not necessarily be the redeveloper of the collegiate site and that by reason of competitive bidding, even if Fordham University is the redeveloper, no subsidy will result. These conclusions are patently erroneous, for they are made in total disregard of the factual aspects of Fordham's participation as a sponsor 494
of the Lincoln Square Urban Renewal Project. The defense to the relief sought by the plaintiffs is predicated entirely upon idle speculation and ignores these facts.

Plaintiffs believe that they have good and meritorious causes of action and that there is no defense to their causes of action. Plaintiffs further believe that the record herein does not present a genuine issue of fact and that, in addition to the temporary injunctive relief heretofore sought, they should therefore be granted summary judgment for the declaratory relief demanded in the 495
complaint.

No prior application has been made for summary judgment as requested herein.

SIDNEY DICKSTEIN.

(Sworn to December 12, 1957.)

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Exhibit A, Annexed to Affidavit of Sidney Dickstein

CITY OF NEW YORK
OFFICE OF COMMITTEE ON SLUM CLEARANCE

Randall's Island
New York 35, N. Y.
Telephone TRafalgar 6-9700

June 28, 1956

Mr. Herbert S. Greenwald
497 135 South LaSalle Street
Chicago 3, Illinois

Re: Lincoln Square Slum Clearance Project

Dear Sir:

I have your letter dated June 25, 1956 offering to sponsor the redevelopment of the Lincoln Square project.

We previously solicited bids for the sponsorship of this project in October 1955 and tentative
498 sponsors who bid $9.35 a square foot were designated. This merely obligates the sponsors to enter into a contract with the City to give a minimum bid at the price agreed upon, and obligates them to relocate the tenants, demolish the buildings and construct the new housing. In the meantime, we are processing our plans with the Housing and Home Finance Agency and negotiating the terms of the redevelopment contract to be entered into between the City and the tentative sponsors.

Exhibit A

Upon approval by the Housing and Home Finance Agency and the Board of Estimate, the properties will be acquired by the City and sold at public auction. We anticipate that the sale will be held early in 1957.

The sale by the City will be publicized and you will have full opportunity to examine the proposals and to bid at the public auction. Your active interest and bid for the project at the time of the sale is solicited.

Very truly yours,

/s/ Robert Moses
Chairman

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Exhibit B, Annexed to Affidavit of Sidney Dickstein

City of New York
Office of Committee on Slum Clearance

Randall's Island
New York 35, N. Y.
Telephone TRafalgar 6-9700

February 15, 1956

503 Myles E. Rieser Company, Inc.
280 Madison Avenue
New York 16, N. Y.

Att: Mr. Myles E. Rieser

Gentlemen:

I have your letter dated February 10, 1956, expressing an interest in the acquisition of the southwest corner of 66th Street and Broadway in the Lincoln Square slum clearance project.

504 A tentative sponsor for the area has been selected. However, you will be given every opportunity to bid at the public auction to be held by the City of New York on the various areas scheduled for private redevelopment.

Your continued interest is very much appreciated.

Very truly yours,

Director

505

Exhibit C, Annexed to Affidavit of Sidney Dickstein

City of New York
Office of Committee on Slum Clearance

Randall's Island
New York 35, N. Y.
Telephone TRafalgar 6-9700

October 19, 1955

506

Mr. Abraham Engelman
141 Broadway
New York, N. Y.

Dear Sir:

In response to your telegram please be advised that preliminary bids for the proposed tentative sponsorship for Lincoln Square were closed October 17, 1955. You may, of course, bid at the public auction which will be held in the future.

Very truly yours,

507

Director

WSL:BS
cc: file

508

Exhibit D, Annexed to Affidavit of Sidney Dickstein

City of New York
Office of Committee on Slum Clearance

Randall's Island
New York 35, N. Y.

Telephone TRafalgar 6-9700

August 23, 1956

509 Mr. Daniel A. Brener
Brener & Lewis Co.
11 East 48th Street
New York 17, N. Y.

Dear Mr. Brener:

I have your letter dated August 10, 1956, expressing interest in sponsoring the redevelopment of the Theatre Center of the Lincoln Square project.

With respect to the theater proposal, as we told you in our letter of June 21st, we are now working
510 on this part of the redevelopment plan with a group headed by Roger Stevens. You may by law enter your own proposal in accordance with arrangements which will be made by the Committee for submitting bids for sponsorship. Those interested, including yourself, will be notified after the September meeting of the Committee of the time during which proposals will be considered by the Committee.

Each interested bidder will be asked to submit a firm offer in dollars per square foot for the property to be acquired, together with the names,

addresses, financial references, personal real estate holdings and constructive activities of the members of the sponsoring group. A certified check in an amount to be determined by the Committee, drawn to the Order of the Treasurer of the City of New York, will be required with each offer. The check will be held as security for the offer made. The tentative sponsor will be selected from among those making proposals after review of all data submitted and the prices offered. At a later date, to be set by the Board of Estimate, after approval of the project by the Federal Government and the City, the tentative sponsor will be required to make the committed bid at a public auction in competition with other bidders, and if he is the successful bidder will be required to carry out the project terms in accordance with the provisions of the contract.

You may be sure that all proposals submitted by tentative sponsors will be carefully reviewed and consideration will be given to any proposal that you make to this Committee in accordance with these arrangements.

Very truly yours,

Assistant to Chairman

WSL:GES:ES
CC: Mr. Lebwohl, Mr. Brooks, Mr. Gapin
File (Mr. Spargo)

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Exhibit E, Annexed to Affidavit of Sidney Dickstein

Cal. No. 139.

Committee on Slum Clearance; Federal Urban Renewal Administration—Authority to Present and Process Proposed Plan for Lincoln Square Urban Renewal Project, Manhattan.

(Secs. 4 Call)

515 On June 15, 1956 (Cal. No. 362), this matter was referred to the City Planning Commission and the Corporation Counsel.

The Secretary presented a communication dated June 7, 1956, from the Chairman of the Committee on Slum Clearance, summarized hereinafter, and the following reports of the City Planning Commission and the Corporation Counsel:

(CP-12553)

June 29, 1956.

516 Hon. Robert F. Wagner, Mayor, Chairman, Board of Estimate:

Sir—At the meeting of the Board of Estimate held on June 15, 1956, Cal. No. 362, there was referred to the City Planning Commission a communication, dated June 7, 1956, from the Chairman of the Committee on Slum Clearance, requesting authorization to present and process with the Federal Urban Renewal Administration a proposed redevelopment plan for the Lincoln Square Slum Clearance Project within the area bounded by West 70th Street, Broadway, Colum-

Exhibit E

bus Avenue, West 60th Street, Amsterdam Avenue, West 66th Street and New York Central Railroad property, Borough of Manhattan. 517

The proposed redevelopment plan includes the provision of an educational site for the Fordham University Downtown Center, comprising the schools of Law, Education, Business and Social Service. Adjacent to this development there is to be established a musical and entertainment center including an opera house, a concert hall and several theatres. Provision is also to be made for an office building, hotel and store development. 518 The plan includes a housing development comprising twelve 20-story buildings providing a total of 4,080 dwelling units. Garages and open parking areas are to be established. Park and landscaped areas and play areas are to be provided and a site for new public school will be reserved.

The proposed redevelopment area lies within Section M-8 of the Master Plan. This section contains substandard and insanitary areas suitable for redevelopment.

On the basis of a preliminary review of this 519 project, it appears that the proposed redevelopment plan will provide for desirable and necessary housing accommodations and community facilities and that the area involved is suitable for redevelopment and is an appropriate location for the type of improvement contemplated.

After the redevelopment plan is processed by the Federal Urban Renewal Administration and submitted by the Committee on Slum Clearance for approval, and after a public hearing in accordance with legal requirements, the Commission will take such action as will then be deemed ad-

520 *Exhibit E*

visable on the basis of all information available with respect to this project.

The City Planning Commission recommends that the request of the Committee on Slum Clearance for authorization to present and process the proposed plan for the Lincoln Square project with the Federal Urban Renewal Administration be approved.

JAMES FELT,
Chairman, City Planning Commission.

521

Law Department, City of New York,

July 16, 1956.

The Board of Estimate, City of New York,

Attention MRS. RUTH W. WHALEY, Secretary:

Sirs—I have your letter dated June 19, 1956, in which you state that the Board of Estimate has referred to me the matter of a request from the Committee on Slum Clearance for authorization to present and process the Lincoln Square Urban Renewal Project, Borough of Manhattan, with the
522 Federal Urban Renewal Administration, together with a communication relating thereto from the Chairman, Committee on Slum Clearance.

The Board of Estimate on June 24, 1954 (Cal. No. 31F), approved an application to the Housing and Home Finance Administrator for Advance Funds for studies, surveys and plans for the proposed Lincoln Square Urban Renewal Project in the Borough of Manhattan. Your Board on January 26, 1956 (Cal. No. 235), approved an application to the Housing and Home Finance Administrator for additional Advance Funds for surveys and studies of additional areas for the aforesaid project.

Exhibit E

The Committee on Slum Clearance on May 28, 1956, submitted to your Board its report and proposed plan for the above project pursuant to the authority granted to the Committee by your Board as stated above.

The City Planning Commission at its meeting held on June 29, 1956 (Cal. No. 5—CP-12553), unanimously adopted a report recommending that the request of the Committee on Slum Clearance for authorization to present and process the proposed plan for the Lincoln Square Project with the Federal Urban Renewal Administration be approved.

I advise you that if you deem it in the best interest of the City, you may adopt a resolution authorizing the Committee on Slum Clearance to present and process its proposed plan for the Lincoln Square Urban Renewal Project with the Federal Urban Renewal Administration.

Yours truly,

PETER CAMPBELL BROWN,
Corporation Counsel.

The following appeared in opposition:

The Reverend V. Simpson Turner, representing Businessmen and Tenants in area; The Honorable Stanley M. Isaacs, Councilman, representing people in Lincoln Square Project area; Louis Okin, Democratic Leader, Third Assembly District North; Harris S. Present, Chairman, New York City Council on Housing Relocation Practices; Gerald Coleman, Chairman on Municipal Affairs Committee of Liberal Party; Robert F. Meagher, representing New York Young Democrats; Milton H. Adler, republican nominee for Council speaking for Lincoln Square Tenants; Joseph A. Brennan, representing Businessmen and Tenants in

526 *Exhibit E*

Lincoln Square Area; Cyril Heath, Chairman, Tenants League of Amsterdam Avenue; Richard Schuckman, Chairman, Lincoln Square Businessmens Committee; Mrs. Olga Siversie, representing Riverside Neighborhood Assembly; Mrs. Ella Roberts, tenant in area affected; Jay Schulman, Teacher-Tenant in area affected; Charles Zayas, representing Puerto Rican People and Puerto Rican Merchants in Lincoln Square; Mrs. Augusta Koenig, citizen in area; Arnold P. Johnson, Committee for improvement for Tenants and Business-
527 men, Godfrey Nurse Houses Area; Janet Shopis, Citizen in area; Hubert Lewis, representing Lincoln Square Tenants Committee; Richard A. Strickland, Co-Chairman, Washington Square Neighbors Association; and the Reverend Herbert C. Banks, Vicar—St. Cykrian's Church.

Statements were made by the Mayor, the Deputy Mayor, the Deputy and Acting Comptroller, the President of the Council and the President of the Borough of Manhattan.

On motion of the President of the Borough of
528 Manhattan, the matter was laid over to August 30, 1956.

Additional Exhibits Admitted on Oral Application

Report of Committee on Slum Clearance to Mayor Wagner and the Board of Estimate, May 28, 1956.

(Omitted by stipulation.)

Relocation Brochure of Committe on Slum Clearance, January 14, 1957.

(Omitted by stipulation.)

529

Affidavit of Leo A. Larkin, Read in Opposition to Plaintiffs' Motions and in Support of Defendants' and Defendants-Intervenors' Motions

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

530

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEO A. LARKIN, being duly sworn, deposes and says:

1. I am the First Assistant Corporation Counsel of the City of New York, and I am fully familiar with the proceedings heretofore had herein. This affidavit is submitted in reply to the affidavit of Sidney Dickstein, sworn to December 12, 1957, in the above entitled matter.

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2. At the outset I wish to point out to the Court that Mr. Dickstein's affidavit is merely a reiteration of plaintiffs' legal contentions. Nevertheless, it is my opinion that analysis of his affidavit compels the conclusion that the plaintiffs have themselves demonstrated that their complaint lacks merit and should be dismissed.

(a)

3. In his affidavits Mr. Dickstein has made statements which, followed to their logical conclusion, wholly discredit the constitutional ques-

532 *Affidavit of Leo A. Larkin*

tions which the plaintiffs have alleged. In his earlier affidavit, sworn to November 27, 1957, in support of the application for a temporary injunction, Mr. Dickstein admitted (p. 12) that there would be no constitutional objections to the sponsorship contract if the sponsor were Columbia University or some other non-sectarian institution. In his subsequent affidavit, sworn to December 12, 1957, in support of the plaintiffs' cross-motion for summary judgment (pp. 7-8)
533 he concedes that if there were no sponsorship contracts and if under those circumstances Fordham University were the successful bidder for redevelopment of the site, there would be no constitutional objections. The Court will recall that upon the argument on December 13, 1957, Mr. Present, the attorney for the plaintiffs, conceded that if under such circumstances Fordham outbid a sectarian or non-sectarian institution, there could be no constitutional objections on the ground of aid to religion.

4. Clearly, then, the plaintiffs' main argument
534 is: They object because the City of New York has accepted Fordham University as the conditional sponsor for redevelopment of the collegiate site in advance of the acquisition and public auction of the land. But this is no more than has been done in every other Title I proceeding in which the City of New York has been involved. The allocation of a definite area for a particular form of redevelopment and the execution of a pre-auction contract with a sponsor is a procedure which has been upheld by the courts in *Kaskel v. Impellitteri*, *Boro Hall Corp. v. Impellitteri*, and *Bleecker Luncheonette Inc. v. Wagner* (cited

at p. 13 of Defendants' Memorandum in Opposition to the motion for temporary injunction). In those cases the courts rejected the claim, identical to plaintiffs' contention herein, that the allocation of a definite area to a particular form of redevelopment and the execution of a pre-auction contract with a sponsor discourage competitive bidding and violate the requirement of the statute requiring a sale at public auction at the highest marketable price.

5. The *Boro Hall* and the *Bleecker Luncheonette* cases also involved sponsors that were educational institutions. However, unlike Fordham University, which has no buildings or plant within the project area, in the *Boro Hall* case involving the Fort Greene project, the sponsor, Long Island University, owned a building devoted to educational purposes which was excluded from the area; and in the *Bleecker Luncheonette* case involving the Washington Square slum project, the sponsor, New York University, similarly owned a building which was excluded from the project area. Since the courts found that the procedures adopted did not violate the provisions of Section 72-k of the General Municipal Law requiring a sale at public auction, then *a fortiori*, such provisions are not violated here. The complete answer to the plaintiffs' contention is that which was given by the Court of Appeals in the *Kaskel* case (306 N. Y. at p. 95) wherein the Court points out that the statutory provisions requiring sale at public auction are not violated where the sponsorship contracts are conditioned upon the sponsors' being the highest bidders. See also the opinion of Mr. Justice Eder in the

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Bleecker Luncheonette case (141 N. Y. S. 2nd at pp. 297-298). Of particular interest is Mr. Justice Eder's rejection of the contention that the sponsorship agreement signifies that the property is thereby "earmarked" for the sponsor. The holding of these cases is that the existence of sponsorship contract does not in any way affect the character of the sales by the City of the redevelopment areas so as to render them anything but true auction sales in compliance with Section 72-k of the General Municipal Law.

539

(b)

6. Mr. Dickstein places significance upon the fact that an interim report of the Committee on Slum Clearance, dated May 28, 1956, identifies Fordham University as the institution interested in the development of the area set aside for redevelopment as a collegiate site. This brochure merely reflected the fact that at the time of its issuance (May 28, 1956) Fordham University had already been approved by the Committee as tentative sponsor on October 17, 1955 (Dickstein's affidavit, p. 3) subject to the approval of the Board of Estimate and the federal agency. The true nature of this brochure was set forth in the affidavit submitted by Mr. Moses in support of the defendants' motions for dismissal of the complaint in *Loebner* v. *The City of New York*. At page 15 of that affidavit, sworn to January 10, 1957, Mr. Moses said:

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> "16. The only basis for the allegations made in the complaint are statements which may be found in a brochure, dated May 28, 1956, which I, as Chairman of the Committee

on Slum Clearance, transmitted to the Board of Estimate on June 7, 1956 in connection with my request for authorization to present and process the proposed Lincoln Square Slum Clearance Project with the Federal Urban Renewal Administration. This brochure is an informal, intermediate work progress report describing the proposed project in terms of ultimate objectives which might be achieved in the project area. That brochure, marked Exhibit A, is made a part of this affidavit and will be submitted to this 542
Court upon the argument of this motion.

17. I want to emphasize at this point the completely informational character of this brochure. Nothing therein contained is of a definitive nature; it does not, cannot, and was not intended in any way to bind the City of New York. The true nature of this informational report may be ascertained from a study of correspondence between the Committee on Slum Clearance and the Federal Urban Renewal Administration. Copies of 543
that correspondence are annexed hereto as Exhibits B through D."

Copies of the correspondence referred to in the quotation from Mr. Moses' affidavit are annexed hereto and similarly marked Exhibits B through D.

The identification of the tentative sponsor in the brochure, I point out, was not found objectionable in the *Bleecker Luncheonette* and the *Boro Hall* cases, discussed above. See, also, the reports of the City Planning Commission printed in the Journal of the Board of Estimate, 1952, p. 16382 and 1953, p. 17244.

544 *Affidavit of Leo A. Larkin*

7. The essential fact, i.e., that this area was intended to be devoted to educational or collegiate purposes, remained and still remains unchanged, as Mr. Dickstein's own reference to the relocation brochure, dated January 14, 1957, so plainly indicates.

(c)

8. The plaintiffs' contentions are so transparently devoid of merit that Mr. Dickstein, in desperation, has seized upon the fact that the
545 sponsorship contract provides for a purchase money mortgage. Mr. Dickstein admits that this is a common practice in Title I transactions (p. 14). What he has failed to state, however, is that provision for a purchase money mortgage is one of the terms of sale on which almost all City property is sold at public auction. Representatives of the Bureau of Real Estate of the Board of Estimate inform me that this practice was in effect, to their knowledge, at least as far back as 1922 (see Exhibit A, annexed hereto, which is a true copy of terms of sales of City property in
546 1922), and at that time had been long established.

9. The well established practice of providing for a purchase money mortgage extends to all purchasers at public auction, whether sectarian or non-sectarian in character. Indeed, purchase money mortgage provisions were contained in the sponsorship contracts with Long Island University and New York University in the Fort Greene and Washington Square projects, respectively. (See Journal of the Board of Estimate, 1953, p. 1928, and 1954, p. 14240.) Furthermore, I have been informed by the Bureau of Real Estate of the Board of Estimate that there have

been numerous sales of real property by the City of New York at public auction, over the years, to religious institutions under terms providing for a purchase money mortgage. The following are merely a few representative illustrations of such transactions:

Lot	Block	County	Date of Sale	Name of Purchaser
35	7017	Kings	11/24/44	Progressive Congregation Anshei Polin of Coney Island 548
37	4627	Bronx	1/30/46	Yeshiva Ahavath Torah
62) 63) 64)	342	New York	5/17/51	Orthodox Catholic Alliance
16	2067	New York	5/18/51	St. John the Baptist 549
17	2071	Kings	1/6/49	Roman Catholic Diocese of Brooklyn
8	161	Queens	11/16/51	Congregation Ahavath Torah of Sunnyside
6	1820	Manhattan	7/3/53	United Sabbath Day Adventists

550 *Affidavit of Leo A. Larkin*

10. This well-established practice indicates a practical construction of long standing that purchase money mortgages do not violate either Article 8, Section 1, of the Constitution (prohibiting extension of city credit to private persons), as plaintiffs concede; or Article 11, Section 4, of the New York State Constitution or the First Amendment of the Federal Constitution.

11. Plaintiffs' objection to the purchase money mortgage provision is merely another expression
551 of its claim that the constitution requires the imposition of special burdens upon religious institutions, so that they may not bid at public auction upon terms and conditions available to others. Such contention has been fully refuted and, as indicated earlier, its lack of merit has been recognized by the plaintiffs themselves.

It is therefore respectfully requested that the defendants' motions be granted and the complaint dismissed on the merits.

552 LEO A. LARKIN.

(Sworn to December 18, 1957.)

553

Exhibit A, Annexed to Affidavit of Leo A. Larkin

AUCTION SALE

Of Property Owned by the

CITY OF NEW YORK

MANHATTAN, BRONX AND QUEENS BOROUGHS

To be sold by order of the
COMMISSIONERS OF THE SINKING FUND

554

Commencing

AUGUST 9TH, 1922
12 o'Clock Noon

AT THE 69TH REGIMENT ARMORY

Lexington Avenue and E. 26th Street
Under the Direction of
CHARLES L. CRAIG
Comptroller of the City of New York

The following are the authorized Auctioneers:

555

Henry Brady,
139 West 33rd St.,
New York.

Samuel Marx,
115 West 23rd St.,
New York.

Joseph P. Day, Inc.
Auctioneer
67 Liberty St., N. Y.

Thomas A. Hovenden,
187 Montague St.,
Brooklyn.

Theodore Archer,
40 New York Ave.,
Jamaica.

556 *Exhibit A*

TERMS OF SALE

The purchaser will be required at the time of sale to sign a memorandum of his purchase and to deposit with the Comptroller a sum equal to ten per cent. of the amount of his bid and pay to the auctioneer his fee of one-half of one per cent. of the bid price. The sum so deposited will be applied by the Comptroller upon the purchase price unless forfeited by the default of the purchaser as hereinafter provided.

557 Seventy-five per cent. of the purchase price, or such portion thereof as the purchaser may desire, may be paid by the giving of a purchase money mortgage and the bond of the purchaser running for five years, with interest at five per cent., the purchaser to pay the recording tax, the recording fee, and all Federal or State taxes or fees in relation thereto, except the mortgage tax; the interest on such bond and mortgage to be paid semi-annually, and the purchaser shall have the privilege of paying off said bond and mortgage, or any part thereof, at any time.

558 The balance of the purchase money will be required to be paid in cash or certified check at the Real Estate Division, in the Office of the Comptroller, Room 733, Municipal Building, Borough of Manhattan, at twelve o'clock noon, twenty (20) days from the date of sale.

The property will be conveyed by The City of New York free and clear of all taxes and assessments which have become a lien thereon on or prior to the date of sale.

Each parcel of property shall be sold subject to any leases, easements, encumbrances or restrictions specified in the description thereof, as well as subject to existing tenancies and any state of facts that an accurate survey would show.

Exhibit A

Each parcel of property will be conveyed by a full covenant and warranty deed in accordance with the description set forth in the resolution of the Commissioners of the Sinking Fund and contained in the catalogue, and subject to any leases, easements, encumbrances or restrictions specified in the description thereof, as well as subject to existing tenancies and any state of facts that an accurate survey may show; the liability of The City of New York upon such covenants and warranty to be limited, however, to the return of the purchase price, with interest at six per cent. and the payment of costs and a reasonable counsel fee to be fixed by the Court and taxed in the action or proceeding wherein the City's liability is determined.

Rents shall be apportioned as of the date of taking title.

The bids will be kept open after the property is struck down until the payment to the Comptroller of ten per cent. of the amount of the bid and to the auctioneer of his fee; and in case the purchaser shall fail to make such payments, or either of them, or to sign the memorandum of his purchase, the premises so struck down to him may, at the option of the Comptroller of The City of New York, be again put up for sale.

In case any purchaser shall fail to complete his purchase by the payment of the whole of the purchase price within the time required, and in accordance with the terms and conditions of the sale, he shall forfeit to The City of New York as liquidated damages his deposit of ten per cent. made at the time the property is struck down; and the premises so struck down to him may, at the option of the Comptroller of The City of New York, be again put up for sale upon the same terms and conditions without liability or accountability of any kind to such purchaser.

562

Exhibit B, Annexed to Affidavit of Leo A. Larkin

HOUSING AND HOME FINANCE AGENCY

Office of the Regional Administrator
Region I
346 Broadway
New York 13, New York

June 27, 1956

Mr. William S. Lebwohl
563 Director, Office of Committee
on Slum Clearance
Randall's Island
New York 35, New York

Dear Mr. Lebwohl:

This is to confirm our discussion on June 15 concerning the New York City Lincoln Square Title I project. At this meeting your attention was called to Mr. Follin's letter to Mr. Moses of September 22, 1955 which confirmed our agreement that brochures would not be printed until
564 after the completion of the final project report. You will recall that the understanding set forth in Mr. Follin's letter was confirmed by Mr. Moses reply of September 28, 1955.

In reviewing the brochure for the Lincoln Square project, we notice that the statement is made that offers for the price of the land to be conveyed to the institutional users are in conformity with appraisals made by the real estate consultants employed by the Committee. This, as we discussed, is not in conformity with the established policy explained to the Committee in the

case of the Washington Square Southeast project, where it was agreed that the price paid by institutional users must be the same as that paid for the most suitable private reuse. The offer from private redevelopers mentioned in the brochure exceeds any of the offers from institutional reusers, although the location of the land for institutional reuse might well be better and the price for private reuse correspondingly higher. It is not necessary at this juncture that the actual prices to be paid by the institutional developer be definitely determined, but we shall require additional appraisals before this is done. It is important however at this time that the institutional reusers understand that the prices in the brochure may not prevail. 566

The brochure also makes a particular point of that fact that each redeveloper will establish a separate relocation office and will work independently of the others, although conceivably such an operation would be overlapping and wasteful, and possibly ineffective. The brochure does mention, however, that in addition to the usual supervisory arrangements established by the Bureau of Real Estate, a Special Tenants Relations Committee will be established for the Lincoln Square area. It is also our understanding from recently published statements of the Committee on Slum Clearance that relocation payments averaging $400 a family will be made by the sponsors. 567

We would appreciate receiving from you, in writing, the explanation you gave concerning the printing of the brochure at this time, the institutional redevelopers understanding as to the price

568 *Exhibit B*

to be paid for the land, and a statement concerning the proposed method of relocation, the relationship of the Special Tenants Relations Committee to the individual sponsors and the source of any relocation payments to be made to tenants.

The omission of comments in this letter on other portions of the brochure such as the redevelopment plan, reuse land values for private redevelopers, cost estimates, etc., is not to be construed as our approval of such portions since the
569 brochure is essentially promotional in character and not acceptable as an official submission. Complete and official comments will be made subsequent to the submission of a preliminary project report and a final project report.

Sincerely yours,

/s/ C. J. Horan
Charles J. Horan
Regional Director of Urban Renewal

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Exhibit C, Annexed to Affidavit of Leo A. Larkin

CITY OF NEW YORK

OFFICE OF COMMITTEE ON SLUM CLEARANCE

Randall's Island
New York 35, N. Y.

Telephone TRafalgar 6-9700

July 19, 1956

572

Mr. Charles J. Horan, Director
Urban Renewal Administration
Housing and Home Finance Agency
346 Broadway
New York 13, N. Y.

Dear Mr. Horan:

I have your letter of June 27th, with respect to the comments of Mr. Follin on the Lincoln Square brochure.

573

As I told you at our discussion, this is not in any way a final plan. It is a preliminary report of the Committee to the Board of Estimate on the project work. Our thought was that the reference in Mr. Follin's letter of September 22, 1955 was directed at the final plan agreed upon with the federal agencies.

The fact is that in order to proceed with final negotiations for a project, a Committee report must be submitted to the Board of Estimate and made public to get consideration by the Board and authorization to proceed to negotiate the final redevelopment plan with your agency. In

addition, public concern and interest in these projects make necessary issuance of these reports on Committee work on each project.

With respect to the offers made by redevelopers, of course we understand that these prices are not final, and all sponsors understand that their offers are subject to approval by your agency and the Board of Estimate in the final contracts and to public auction as well. We do question, as we have in the past, any rule that "the price paid
575 by institutional users must be the same as that paid for the most suitable private re-use." However, the appraisals submitted must satisfy you and in the last analysis you will have approval of all offers made.

With respect to the relocation of the residential tenants, our redevelopment contracts with respective sponsors will require them to relocate the residential tenants under the supervision of the Bureau of Real Estate of the Board of Estimate. Each sponsor will separately maintain its own management office but a relocation office, operated
576 by the Bureau of Real Estate of the Board of Estimate will be centrally located on the site and all relocation activities of all the sponsors will be coordinated and supervised here. Experience has shown that the average cost of the sponsors for relocation activities, which include reimbursement of personnel and administration by the Bureau of Real Estate of the Board of Estimate, finder's fees, broker's fees, painting, moving expenses, etc., is now about $340. We expect this to increase to an average of at least $400, and probably more, in Lincoln Square. We are also planning to assist in relocation of commercial tenants

Exhibit C

in Lincoln Square. We are hopeful that Congress will make provisions in the Housing Act of 1956 for relocation payments of $200 per family and at least $2,000 for commercial tenants.

A Special Tenants Relations Committee, headed by Percy Gale, Jr., Director of Real Estate, has been organized in Lincoln Square to review policies and hardship cases and, where necessary, to provide payments in excess of $400.

You may be sure that we are fully aware of the necessity for close cooperation with your office in processing the final plan. We have attempted to keep your local office in touch with everything we are doing, and we are in complete agreement that any final plan of redevelopment, including prices, facilities and plans, must bear your official approval before becoming effective.

Very truly yours,

/s/ William S. Lebwohl
Director

580

Exhibit D, Annexed to Affidavit of Leo A. Larkin

HOUSING AND HOME FINANCE AGENCY
URBAN RENEWAL ADMINISTRATION
Washington 25, D. C.

September 22, 1955

Mr. Robert Moses
Chairman
Committee on Slum Clearance
Randall's Island
581 New York 35, N. Y.

Dear Mr. Moses:

As a result of our exchange of correspondence (your letter to me of July 18, my reply of July 26, and your reply of August 4), a meeting with representatives of your office was held recently in the New York Regional Office to discuss the procedure under which the future New York City projects will be handled. Mr. Richard Steiner, Deputy Commissioner, and Mr. John Shively, Director
582 of Project Procedures and Review, represented the Washington Office and members of the New York Regional Urban Renewal staff represented the Region. As a result of these discussions, it was agreed that the Committee on Slum Clearance for New York City would submit to the Regional Office a preliminary project report for all new projects, including those projects now in a planning stage, namely, Lincoln Square, Delancey Street, Seward Park, Hammels, and Park Row. This preliminary project report will include a redevelopment plan of a preliminary nature, to-

gether with data on eligibility characteristics of the project area, information on relocation, land acquisition, land disposition, and project cost and financing.

For the Delancey Street project, the documentation is to be assembled in accordance with Part 2, Chapter 1, Section 3, Page 17, of the Local Public Agency Manual. For the remaining four projects, the documentation is to be prepared and assembled in accordance with Codes numbered R 201 to R 291, described in Section 3, Pages 3 to 584
22 of LPA Letter 45, dated December 29, 1954.

It was also agreed that loan and grant applications would be prepared and submitted in accordance with procedures outlined in LPA Letter No. 56, providing for Final Project Report, to be followed after our review and necessary local approvals by the Local Project Approval Data.

It was further agreed that the Regional Office and Central Office would make every effort to complete the processing of each preliminary project report and each final project report within six 585
weeks from the time of its submission to the Regional Office, provided that the report is in acceptable form. Similar efforts would be made to adhere to a schedule of three weeks from the receipt in acceptable form of the local project approval data to the dispatch of a grant contract.

Both the preliminary project report and final project report are to be submitted for review in typewritten form and brochures will not be printed until after completion of the final project report. The resolutions and authenticating documents in

586 *Exhibit D*

connection with the redevelopment plan will clearly identify the plan and make it a part thereof.

At the meeting the agreement contained in your letter of January 4, 1955, to Administrator Cole, was also confirmed. In this letter you agreed with the basis for handling disposition of project land proposed by Mr. Cole in his letter to you dated December 22, 1954, but you did not agree with the Administrator's suggestion that the City
587 select, on an experimental basis, a project in which the City itself would handle property management, relocation, demolition and clearance activities.

I believe the meeting was mutually beneficial, and the agreements reached should serve to clarify the procedures to be followed for future New York City projects including those now in the planning stage.

Sincerely,

588 (Signed) J. W. Follin
J. W. Follin
Urban Renewal Commissioner

589

Stipulation as to Exhibits

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

64TH ST. RESIDENCES, INC., *et al.*,
Plaintiffs-Appellants,

against

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CITY OF NEW YORK, *et al.*,
Defendants-Respondents,

and

FORDHAM UNIVERSITY, *et al.*,
Defendants-Intervenors-Respondents.

IT IS HEREBY STIPULATED and AGREED by and between the attorneys for the respective parties hereto, subject to approval of this Court, that the printing of the following exhibits may be dispensed with, in the interest of economy and to avoid unnecessarily encumbering the record, without prejudice to the right of any of the parties to refer to the same in the briefs or on the argument with the same force and effect as though printed in full:

591

Urban Renewal Plan and Maps; annexed to affidavit of Robert Moses, verified Dec. 4, 1957, as Exhibit A; annexed to answer of defendants City of New York et al. as Exhibit A; and annexed to answer of defendant-intervenor Fordham University as Exhibit A.

592 *Stipulation as to Exhibits*

Proposed Sponsorship Agreement between the City of New York and Fordham University; annexed to affidavit of Robert Moses, verified Dec. 4, 1957, as Exhibit B; annexed to answer of defendants City of New York et al. as Exhibit B; and annexed to answer of defendant-intervenor Fordham University as Exhibit C.

City Planning Commission Report on Lincoln Square Urban Renewal Plan and
593 Project, October 2, 1957, CP-13508, Cal. No. 2; annexed to answer of defendants City of New York et al. as Exhibit C.

Proposed Capital Grant Contract between City of New York and Urban Renewal Administration; annexed to answer of defendant City of New York et al. as Exhibit G.

Proposed Sponsorship Agreement between the City of New York and Lincoln Center for the Performing Arts, Inc.; annexed to affidavit of Edgar B. Young, verified Dec.
594 12, 1957 as Exhibit A.

Report of Committee on Slum Clearance to Mayor Wagner and the Board of Estimate, dated May 28, 1956; referred to in affidavit of Sidney Dickstein, verified Dec. 12, 1957, and admitted as an exhibit on oral application.

Relocation Brochure of Committee on Slum Clearance, dated Jan. 14, 1957; referred to in affidavit of Sidney Dickstein, verified Dec. 12, 1957, and admitted as an exhibit on oral application.

Stipulation as to Exhibits

It is further stipulated and agreed that upon the argument of this appeal the original or copies thereof will be handed up to the Court.

Dated: New York, January 21, 1958.

Harris L. Present,
Attorney for Plaintiffs-Appellants.

Peter Campbell Brown,
Corporation Counsel, Attorney for Defendants-Respondents City of New York, et al.

Saxe, Bacon & O'Shea,
Attorneys for Defendant-Intervenor-Respondent Fordham University.

Milbank, Tweed, Hope & Hadley,
Attorneys for Defendant-Intervenor-Respondent Lincoln Center for the Performing Arts, Inc.

Rosenman, Goldmark, Colin & Kaye,
Attorneys for Defendant-Intervenor-Respondent Webb & Knapp Lincoln Square Corporation.

These exhibits are to be filed on or before Wednesday, February 5th, 1958.

So Ordered.

BE

598

Opinion of McGivern, J.

(New York Law Journal—December 24, 1957)

64th St. Residences, Inc. v. City of N. Y. (Fordham University)—This litigation had its origin in an action brought by certain owners of real property and by certain tenants in a locale known as "Lincoln Square", in the City of New York, against the City of New York, Robert F. Wagner as Mayor of the City of New York et al. The plaintiffs therein seek an injunction restraining
599 the City of New York and the other defendants from acquiring the "Lincoln Square" area by condemnation or otherwise, from executing and carrying out the terms of a proposed sponsorship contract with Fordham University, from further processing the project with the Federal Urban Renewal Administration and from expending or committing any city funds in connection with the project.

The facts, which are not in dispute, reveal that the Lincoln Square Urban Renewal Plan contemplates the razing and replanning of a slum area on
600 the west side of Manhattan Island between Sixtieth and Seventieth Street, bounded by Broadway, Columbus Avenue, West End Avenue and Riverside Drive. The area is to be developed for the following uses: Collegiate, multi-family residential, commercial, retail, public and semi-public uses. As an aid to the expedition of the project, Robert Moses as Chairman of the Committee on Slum Clearance of the City of New York, solicited and selected tentative sponsors for each of the areas involved. Fordham University was one of

the sponsors selected to bid at public auction for the redevelopment of the Collegiate site. By the terms of its sponsorship contract, Fordham bound itself to bid a minimum upset price at a public auction, upon the terms and conditions specified in the contract, and to redevelop the area in accordance with the Renewal Plan, if it became the successful bidder at the public auction.

After an order to show cause, wherein no stay was permitted, had brought on an application for a temporary injunction, and while this was still 602
sub judice, the defendants moved for an order granting: 1. Judgment on the pleadings pursuant to section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, dismissing the complaint on the ground that it does not state facts sufficient to constitute a cause of action; or in the alternative: 2. Summary judgment pursuant to Rule 113 of the Rules of Civil Practice dismissing the complaint. The plaintiffs, simultaneously moved for summary judgment, conceding the absence of any genuine issue of fact.

Thus, there is alone here presented a narrow 603
Constitutional issue, testing whether or not a sectarian educational institution must be excluded from a neighborhood or a community which is being replanned and reconstructed as part of a slum clearance project directed by the government and furthered by government funds. This represents the controlling question of the controversy.

The plaintiffs contend that the proposed sponsorship by Fordham University of a portion of the redevelopment area would violate article 11, section 4 and article 1, section 7 of the New York State Constitution and the First and Fourteenth

604 *Opinion of McGivern, J.*

Amendments to the Federal Constitution, in that such sponsorship would result in the giving of governmental "aid or maintenance" to a religious educational institution. The defendants contend that no such "aid or maintenance" is involved and that the transaction between Fordham and the City of New York, assuming it is consummated, is but a lawful contract involving an exchange of valuable considerations on both sides; the defendants further contend that if Fordham were to be
605 debarred by a court of law from consummating such a contractual arrangement, such an act would constitute a denial of the equal protection of the laws and visit upon Fordham an oppressive restriction upon the free exercise of religion, guaranteed to Fordham and all others, by the Federal and State Constitution.

The court finds no force or validity in the plaintiffs' position. The contention of "aid or maintenance" to a sectarian institution in contravention of constitutional prohibitions, is not available under the circumstances obtaining here. Fordham, and indeed the other prospective sponsors who
606 may undertake to bid at public auction for the properties embraced within the redevelopment plan, are not and do not seek to be the recipients of governmental largesse. If successful at the auction, Fordham will have committed itself to pay a not inconsiderable sum of money (representing at least the full reuse value of the land as determined by appraisal), but in addition will also have: (a) undertaken to relocate the present occupants of the site, (b) demolish the structures presently there, (c) redevelop the land and construct new buildings thereon, upon meticulous terms and conditions prescribed by the Board of

Estimate of the City and the Federal Urban Renewal Administration.

Thus, if the successful bidder at the auction of the proposed Collegiate site, Fordham will merely exercise its corporate powers to contract, as may any other educational institution that cares to come forward at the time. Thus, there is no gift or subsidy contemplated but a valid contract, to be sustained by substantial consideration moving to the city, and effecting an exchange of benefits to both parties on a quid pro quo basis. This arrangement precludes a holding that the proposed sponsorship plan, challenged by the plaintiff, will operate to confer "aid" upon Fordham. To hold, under the instant circumstances, that a denominational school may not be afforded the same opportunity to contract as any other private institution or corporation, would be to convert the constitutional safeguards into a sword against the freedoms which they were intended to shield. 608

And the proposed procedure, entailing the execution of a pre-auction sponsorship contract, not unusual in Title I proceedings wherein the City has been a party, has been upheld by our Court of Appeals (Kaskel v. Impelliteri, 306 N. Y. 73, 1953, cert. den. 347 U. S. 934, 1954; Boro Hall Corp'n v. Impelliteri, 128 N. Y. S. 2d, 804 [Sup. Ct., Kings Co., 1954], aff'd 283 App. Div., 889 [2nd Dept., 1954], leave to appeal denied 307 N. Y., 672 [1954]; Bleecker Luncheonette, Inc. v. Wagner, 141 N. Y. S. 2d 293 [Sup. Ct., N. Y. Co., 1955], aff'd 286 App. Div., 828 [1st Dept., 1955], leave to appeal denied 309 N. Y. 1029 [1955]). 609

It is noteworthy that counsel for the plaintiff, on oral argument, conceded that there is no prohibi-

610 *Opinion of McGivern, J.*

tion excluding Fordham per se from the suggested plan and procedure, assuming Fordham to be the successful bidder at the auction. In the view of this court, such crucial concession leaves the plaintiffs' position without visible means of support. And in hard reality, to exclude Fordham, or any other sectarian institution, from great over-all community planning efforts, such as the Lincoln Square Project, would be to relegate such institutions to the "other side of the tracks," in perpetuity. Nor has this been the practice (cf. the affida-
611 vit of Commissioner Robert Moses, in opposition to the plaintiffs' motion for a preliminary injunction). This pre-eminent authority demonstrates statistically that denominational institutions, such as churches and schools, have long been sought and regarded as integral parts of any well-planned community, and that participation in redevelopment programs by religious institutions is not extraordinary.

Implicit recognition of this fact has been accorded by the United States Supreme Court. In Berman v. Parker (348 U. S. 26 [1954]) the court
612 had before it a slum clearance project in the City of Washington undertaken pursuant to the District of Columbia Redevelopment Act of 1945 (60 Stat., 790). In upholding the Redevelopment Act, the court said (348 U. S., at pp. 34-35): "* * * The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also *schools, churches*, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. * * * *Such diversifi-*

cation in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power" (emphasis supplied).

The intendment of such statutes is to throw an arm of protection around a whole community and to uplift it, not to ward off some units of the community because of accidental factors such as creed.

And assuredly, the integration of Fordham in such a vast development as Lincoln Square is not a step towards the establishment of a national religion, offensive to the First Amendment of the 614
Federal Constitution. Public welfare legislation, such as the slum clearance law before us and the acts taken thereunder, which extend the general benefit of New York State law "to all its citizens without regard to their religious belief" are not to be considered as establishments of religion (Everson v. Board of Education, 330 U. S., 1, 16 [1947]). Nor have our courts ever temporized with rejecting arguments that state action was aiding in the establishment of religion where concurrence would result in the encroachment upon the free exercise of religion. 615
See, for example, People ex rel. New York League for Separation of Church and State v. Hayes (173 Misc., 821; Sup. Ct., Albany County, 1940), where the construction, with private funds, of churches in state prisons was sought to be enjoined. The court found that the "permission to build by the state is in keeping with the freedom of worship as expressed in the Constitution," referring to article 1, section 3, of the State Constitution (173 Misc., at p. 824). So, in the case at bar, we have, *not* acts which aid in the establishment of a religion, but acts whose

purpose is to prevent the restriction of freedom to worship (see also, Lewis v. Board of Education of City of New York, 157 Misc., 520 [Sup. Ct., N. Y. County, 1935]; mod. on other grounds, 247 App. Div., 106 [1st Dept., 1936]; People ex rel. Lewis v. Graves, 245 N. Y., 195 [1927]; Matter of Lewis v. Mandeville, 201 Misc., 120 [Supreme Court, Westchester County, 1951).

It has been well said that the coin of the First Amendment has two sides. Whenever it is contended that a certain state act is in aid of the es-
617 tablishment of religion, the obverse side of the coin must perforce be examined, lest, in the striking down of the proposed act, the right to freedom of religion be destroyed. As the Court of Appeals said in Matter of Zorach v. Clauson (303 N. Y., 161, 172 [1951], aff'd 343 U. S., 306 [1952]): "* * * it must * * * be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof.' We *must not destroy one in an effort to preserve the other*" (emphasis supplied). It would unduly lengthen this opinion to
618 quote extensively from Judge Froessel's well-considered opinion in the Zorach case. Therein, however, he points out that the "wall of separation" between church and state "is designed as a reasonable line of demarcation between friends" and not an "'iron curtain' as between foes," and that instances abound which prove that not "every friendly gesture between church and State shall be discountenanced" (303 N. Y., at pp. 171-172).

In the instant case, it may well be that if Fordham does evolve as the successful purchaser of the collegiate site, such a transaction may prove to be

a "good deal" for Fordham. But this fortuitous factor does not debar it. If the public good is enhanced it is only secondary that private interests may be benefited (Murray v. LaGuardia, 291 N. Y., 320, 52 N. E., 884; Loebner v. City of N. Y., 162 N. Y. S. 2d, 233).

The foregoing considerations and precedents impel the conclusion that the Lincoln Square Slum Clearance Plan cannot arbitrarily exclude a denominational school from the area to be replanned (Matter of Community Synagogue v. Bates, 1 N. Y., 2d, 445, 458 [1956]). And further, no aid at 620
all in the establishment of religion is here envisaged. The plan simply imports that Fordham and the City have achieved an accommodation of purposes resulting in a contract, to be consummated by a purchase at a public auction, and having as its end and aim the resuscitation of a blighted area and its rededication to a better and a more abundant community life.

The defendants' motion for summary judgment is granted and the complaint is dismissed.

Settle order.

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Waiver of Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order and judgment appealed from, and all the papers upon which the Court below acted in making said order and judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby
623 waived.

Dated: New York, January , 1958.

HARRIS L. PRESENT,
Attorney for Plaintiffs-Appellants.

PETER CAMPBELL BROWN,
Corporation Counsel,
Attorney for Defendants-Respondents.

SAXE, BACON & O'SHEA,
624 Attorneys for Defendant-Intervenor-Respondent Fordham University.

MILBANK, TWEED, HOPE & HADLEY,
Attorneys for Defendant-Intervenor-Respondent Lincoln Center for the Performing Arts, Inc.

ROSENMAN, GOLDMARK, COLIN & KAYE,
Attorneys for Defendant-Intervenor-Respondent Webb & Knapp Lincoln Square Corporation.

ADDITIONAL PAPERS
TO THE
COURT OF APPEALS

Notice of Appeal to the Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, and ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHIL DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

CITY OF NEW YORK; ROBERT F. WAGNER as Mayor of the City of New York and a member of the Board of Estimate; LAWRENCE E. GEROSA as Comptroller of the City of New York and a member of the Board of Estimate; ABE STARK as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK as President of the Borough of Manhattan, City of New York and a member of the Board of Estimate; JAMES J. LYONS as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES A. LUNDY, as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES as Chairman of the Committee on Slum Clearance of the City of New York,

Defendants-Respondents,

FORDHAM UNIVERSITY, LINCOLN CENTER FOR THE PERFORMING ARTS, INC. and WEBB & KNAPP LINCOLN SQUARE CORP.,

Defendants-Intervenors-Respondents.

628 *Notice of Appeal to the Court of Appeals*

Sirs:

PLEASE TAKE NOTICE that the above named plaintiffs hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court for the First Department, dated February 20, 1958, and filed and entered in the Office of the Clerk of said Appellate Division on the same day, which affirmed, without opinion, the Order of Special Term Part III, of the Supreme Court, New York County, and the judgment en-
629 tered thereon which were respectively entered in the Office of the Clerk of the County of New York on the 30th day of December, and the 2nd day of January, 1958; and the said plaintiffs hereby appeal from each and every part of said Order as well as from the whole thereof.

Dated: New York, New York,

February 21, 1958.

Yours, etc.,

630 HARRIS L. PRESENT, Esq.,
Attorney for Plaintiffs-Appellants,
Office & P. O. Address,
375 Park Avenue,
New York, New York.

To:

PETER CAMPBELL BROWN, Esq.,
Corporation Counsel,
Attorney for Defendants-Respondents,
City of New York, et al.,
Municipal Building,
New York 7, New York.

Notice of Appeal to the Court of Appeals 631

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Attorneys for Defendant-Intervenor-Respondent, Fordham University,
20 Exchange Place,
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MILBANK, TWEED, HOPE & HADLEY, Esqs.,
Attorneys for Defendant-Intervenor-Respondent, Lincoln Center for the Performing Arts, Inc.,
15 Broad Street,
New York 5, New York.

HON. JAMES MCGURRIN,
County Clerk, New York County.

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Order of Affirmance

At a term of the Appellate Division of the Supreme held in and for the First Judicial Department in the County of New York, on the 20th day of February, 1958.

Present:

HON. BERNARD BOTEIN,
Presiding Justice.
" CHARLES D. BREITEL,
635 " BENJAMIN J. RABIN,
" MARTIN M. FRANK,
" JAMES B. M. MCNALLY,
Justices.

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, and ROSE W. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as
636 co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

CITY OF NEW YORK; ROBERT F. WAGNER as Mayor of the City of New York and a member of the Board of Estimate; LAWRENCE E. GEROSA as Comptroller of the City of New York and a member of the Board of Estimate; ABE STARK as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK as President of the Borough of Manhattan, City of New York and a

Order of Affirmance 637

member of the Board of Estimate; JAMES J. LYONS as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES A. LUNDY, as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES as Chairman of the Committee on Slum Clearance of the City of 638
New York.

Defendants Respondents,

FORDHAM UNIVERSITY, LINCOLN CENTER FOR THE PERFORMING ARTS, INC. and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Defendants-Intervenors-Respondents.

An appeal having been taken to this Court by the plaintiffs-appellants from an order of the Supreme Court, New York County, entered on the 30th day of December, 1957, granting the defendants' motion for summary judgment, denying 639
plaintiffs' motion for a temporary injunction pendente lite and denying plaintiffs' motion for summary judgment for declaratory relief; and from the judgment of said Court entered thereon, dated January 2, 1958, dismissing the complaint.

And said appeal having been argued by Mr. Harris L. Present of counsel for the appellants, and by Mr. Anthony Curreri of counsel for The City of New York, et al., defendants-respondents; by Mr. Porter R. Chandler and Mr. Edward D. Burns of counsel for the Intervenor-Defendant

640 *Order of Affirmance*

Respondent, Fordham University; by Mr. William Eldred Jackson, of counsel for the Intervenor-Defendant-Respondent, Lincoln Center for the Performing Arts, Inc.; by Mr. Samuel I. Rosenman of counsel for the Intervenor-Defendant-Respondent, Webb & Knapp Lincoln Square Corporation; and a brief amicus curiae having been filed by West Side Chamber of Commerce of the City of New York, Inc., by Mr. Sandford Schmaus, of counsel; and a brief amicus curiae having been filed by Lincoln Guild Housing Cor-
641 poration, by Mr. Eugene J. Morris, of counsel; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order and judgment so appealed from be and the same hereby are affirmed with costs and disbursements to the respondents, and the intervenors-respondents.

Enter,

VINCENT A. MASSI,
Clerk.

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Judgment of Affirmance 643

SUPREME COURT

New York County

64th St Residences, Inc. and 89 Amsterdam Avenue Corporation, suing under Section 51, General Municipal Law, and Rose K. Harris, Edythe R. Sherrick, and Renee Bouret, suing on behalf of themselves and all others similarly situated, and United Ball Bearing Co., Inc. and Seymour Dambrot and Philip Derman, as co-partners doing business in the name and style of Dambrot & Derman, suing on behalf of themselves and all others similarly situated, 644

Plaintiffs-Appellants,

vs.

City of New York; Robert F. Wagner as Mayor of the City of New York and a member of the Board of Estimate; Lawrence E. Gerosa as Comptroller of the City of New York and a member of the Board of Estimate; Abe Stark as President of the City Council of the City of New York and a member of the Board of Estimate; Hulan E. Jack as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; James J. Lyons as President of the Borough of Bronx, 645 City of New York, and a member of the Board of Estimate; John Cashmore as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; James A. Lundy as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; Albert V. Maniscalco, as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; Robert Moses as Chairman of the Committee on Slum Clearance of the City of New York.

Defendants-Respondents,

Fordham University, Lincoln Center for the Performing Arts, Inc., and Webb & Knapp Lincoln Square Corporation,

Defendants-Intervenors-Respondents.

646 *Judgment of Affirmance*

The plaintiffs-appellants having appealed to the Appellate Division of the Supreme Court, First Department, from an order of the Supreme Court, New York County, entered on the 30th day of December, 1957, granting the defendants' motion for summary judgment, denying plaintiffs' motion for a temporary injunction *pendente lite* and denying plaintiffs' motion for summary judgment or declaratory relief; and from the judgment of said Court entered thereon, dated January 2, 1958, dismissing the complaint and the
647 appeal having been duly argued in the Appellate Division and that Court in an order entered in the office of the Clerk of said Appellate Division on the 20th day of February, 1958, having unanimously ordered and adjudged that the order and judgment so appealed from be affirmed with costs and disbursements to the respondents and the intervenors-respondents (and a certified copy of said Appellate Division order having been duly filed in the office of the Clerk of the County of New York on or about the 21st day of February, 1958) and the costs of the defendants-respondents
648 having been duly taxed at the sum of $125.04 and the costs of the defendant-intervenor-respondent, Fordham University, having been duly taxed at the sum of $174.44 and the costs of the defendant-intervenor-respondent, Lincoln Center for the Performing Arts, Inc., having been duly taxed at the sum of $52.70 and the costs of the defendant-intervenor-respondent, Webb & Knapp Lincoln Square Corporation, having been duly taxed at the sum of $26.85.

Now, on motion of Peter Campbell Brown, Corporation Counsel, attorney for defendants-re-

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spondents; Saxe, Bacon and O'Shea, Esqs., attorneys for defendant-intervenor-respondent, Fordham University; and Milbank, Tweed, Hope and Hadley, Esqs., attorneys for defendant-intervenor-respondent, Lincoln Center for the Performing Arts, Inc., and Rosenman, Goldmark, Colin & Kaye, Esqs., attorneys for defendant-intervenor-respondent, Webb & Knapp Lincoln Square Corporation, it is

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ADJUDGED that the judgment so appealed from be and the same hereby is unanimously affirmed, and it is further

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ADJUDGED that the defendants-respondents, City of New York; Robert F. Wagner as Mayor of the City of New York; Lawrence E. Gerosa as Comptroller of the City of New York; Abe Stark as President of the City Council of the City of New York; Hulan E. Jack as President of the Borough of Manhattan, City of New York; James J. Lyons as President of the Borough of Bronx, City of New York; John Cashmore as President of the Borough of Brooklyn, City of New York; James A. Lundy as President of the Borough of Queens, City of New York; Albert V. Maniscalco as President of the Borough of Richmond, City of New York; Robert Moses as Chairman of the Committee on Slum Clearance of the City of New York (Municipal Building, New York City), recover of the plaintiffs-appellants, 64th St. Residences, Inc. (146 West 64th Street, N. Y. C.), 89 Amsterdam Avenue Corporation (89 Amsterdam Avenue, N. Y. C.), Rose K. Harris, Edythe R. Sherrick and Renee Bouret (101 West 66th Street,

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N. Y. C.), United Ball Bearing Co. Inc. (49 Amsterdam Avenue, N. Y. C.), Seymour Dambrot and Philip Derman, as co-partners doing business in the name and style of Dambrot & Derman (40 Columbus Avenue, N. Y. C.), the sum of $125.04 costs as taxed and that said defendants-respondents have execution therefor, and it is further

653 ADJUDGED that the defendant-intervenor-respondent, Fordham University (Fordham Road, Bronx, N .Y. C.), recover of the plaintiffs-appellants, 64th St. Residences, Inc. (146 West 64th Street, N. Y. C.), 89 Amsterdam Avenue Corporation (89 Amsterdam Avenue, N. Y. C.), Rose K. Harris, Edythe R. Sherrick and Renee Bouret (101 West 60th Street, N. Y. C.), United Ball Bearing Co. Inc. (49 Amsterdam Avenue, N. Y. C.), Seymour Dambrot and Philip Derman, as co-partners doing business in the name and style of Dambrot & Derman (40 Columbus Avenue, N. Y. C.), the sum of $174.44 costs as taxed and that said defendant-intervenor-respondent have execution therefor, and it is further

654 ADJUDGED that the defendant-intervenor-respondent, Lincoln Center for the Performing Arts, Inc. (10 Columbus Circle, N. Y. C.), recover of the plaintiffs-appellants, 64th St. Residences, Inc. (146 West 64th Street, N. Y. C.), 89 Amsterdam Avenue Corporation (89 Amsterdam Avenue, N. Y. C.), Rose K. Harris, Edythe R. Sherrick and Renee Bouret (101 West 60th Street, N. Y. C.), United Ball Bearing Co. Inc. (49 Amsterdam Avenue, N. Y. C.), Seymour Dambrot and Philip Derman, as co-partners doing business in the name and style of Dambrot & Derman (40

Judgment of Affirmance 655

Columbus Avenue, N. Y. C.), the sum of $52.70 costs as taxed and that said defendant-intervenor-respondent have execution therefor, and it is further

ADJUDGED that the defendant-intervenor-respondent, Webb & Knapp Lincoln Square Corporation (575 Madison Avenue, N. Y. C.) recover of the plaintiffs-appellants, 64th St. Residences, Inc. (146 West 64th Street, N. Y. C.), 89 Amsterdam Avenue Corporation (89 Amsterdam Avenue, N. Y. C.), Rose K. Harris, Edythe R. Sherrick and Renee Bouret (101 West 60th Street, N. Y. C.), United Ball Bearing Co. Inc. (49 Amsterdam Avenue, N. Y. C.), Seymour Dambrot and Philip Derman, as co-partners doing business in the name and style of Dambrot & Derman (40 Columbus Avenue, N. Y. C.), the sum of $26.85 costs as taxed and that said defendant-intervenor-respondent have execution therefor. 656

Dated: February 21, 1958.

JAMES MCGARRIN, 657
Clerk.

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Stipulation Waiving Certification of Record to Court of Appeals

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Record on Appeal to the Appellate Division, First Department; the Order of Affirmance; the Judgment of Affirmance and the Notice of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the County of New York.

659

Certification of all of the foregoing papers is hereby waived.

Dated: New York, March , 1958.

HARRIS L. PRESENT,
Attorney for Plaintiffs-Appellants.

PETER CAMPBELL BROWN,
Corporation Counsel,
Attorney for Defendants-Respondents,
City of New York, et al.

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SAXE, BACON & O'SHEA,
Attorneys for Defendant-Intervenor-Respondent, Fordham University.

MILBANK, TWEED, HOPE & HADLEY,
Attorneys for Defendant-Intervenor-Respondent, Lincoln Center for the Performing Arts, Inc.

ROSENMAN, GOLDMARK, COLIN & KAYE,
Attorneys for Defendant-Intervenor-Respondent, Webb & Knapp Lincoln Square Corporation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 1014

ROSE K. HARRIS, EDYTHE K. SHEARER, and RUTH BOURKE, suing on behalf of themselves and all others similarly situated, and UNITED BAR SERVICE, INC., and SEYMOUR DAMBERT and PHILIP DERMAN, as co-partners doing business under the name and style of DAMBERT & DERMAN, suing on behalf of themselves and all others similarly situated,
Petitioners,

v.

CITY OF NEW YORK, & ORS., & C., *Respondents*,

FORDHAM UNIVERSITY, & ORS.,
Intervening Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

DAVID L. SHEARER
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New York, New York
Counsel for Petitioners

HARRIS L. PERSENT
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New York, New York,

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New York, N. Y.

Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated, *Petitioners,*

v.

CITY OF NEW YORK, & ORS., & C., *Respondents,*

FORDHAM UNIVERSITY, & ORS., *Intervenors-Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Rose K. Harris, Edythe R. Sherrick, Renee Bouret, United Ball Bearing Co., Inc., Seymour Dambrot, and Philip Derman, petitioners herein, pray that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York entered on May 1, 1958, which affirmed the judgment of the Appellate Division, Supreme Court, State of New

York, First Judicial Department, entered February 20, 1958, affirming, without opinion, the judgment of Special Term, New York Supreme Court, New York County, entered December 30 1957, granting respondents' motion for summary judgment and dismissing petitioners' complaint.

OPINIONS BELOW

The opinion of the New York Court of Appeals has not been officially reported, but is set out in Appendix "B," *infra*, pp. 35-39.[1] The opinion of Special Term, New York Supreme Court, New York County has not been officially reported, but is set out at R.[2] 200-207.

JURISDICTION

The judgment of the New York Court of Appeals was entered on May 1, 1958. Also, on that date the remittitur of the Court of Appeals was issued to the New York Supreme Court, New York County. Appendix "C," *infra* at p. 40. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257 (3).

QUESTIONS PRESENTED

(1) Was the action of the Board of Estimate of the City of New York on November 26, 1957 (a) approving the Lincoln Square Urban Renewal Project Plan, (b) approving the project redevelopment contracts,

---

[1] The Appellate Division, New York Supreme Court, First Judicial Department, did not write an opinion. Its order affirming the judgment of Special Term is set forth at pp. 212-214 of the Record as printed for the use of the Court below and is reported at — App. Div. 2d —, 170 N.Y.S. 2d 993.

[2] The letter "R" refers to the pages of the record as printed for the use of the Court below.

(c) authorizing the acquisition of the project area by condemnation, and (d) authorizing the sale of the project area in accordance with said plan, in violation of the "establishment of religion" clause of the First Amendment, and the due process clause of the Fourteenth Amendment of the United States Constitution?

(2) A "re-use restriction" for "educational purposes" of part of the Lincoln Square Urban Renewal Project area was specifically adopted upon the agreement of Fordham University—a Roman Catholic Institution—to act as sponsor and redeveloper of that portion of the project. The negotiated price of the land was higher than the "re-use" value of the property in the light of the "restriction" adopted for Fordham's "re-use," but was less than "acquisition cost." Was the action of the Board of Estimate of the City of New York, in condemning the project plan area and in selling to Fordham that portion reserved for "educational purposes" at a previously negotiated price approximately 3½ million dollars less than the price to be paid for that part by the City in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

(3) Was the action of the Board of Estimate of the City of New York, as set forth in Question (2), above, the taking of private property for a non-public use in violation of the Fourteenth Amendment to the United States Constitution?

(4) Both the Special Term, New York Supreme Court, New York County, and the New York Court of Appeals, construed Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and Section 72-k of the New York General

Municipal Law, as permitting a religious institution to participate in an urban renewal redevelopment project on the basis of a previously negotiated price, approximately 3½ million dollars less than the price to be paid by the City (two-thirds of which will be borne by the Federal Government). As construed by the New York Court of Appeals:

> (a) Is Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, unconstitutional as a violation of the First Amendment to the United States Constitution:
>
> (b) Is Section 72-k of the New York General Municipal Law unconstitutional as a violation of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States. The statutes involved are Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and Section 72-k of the New York General Municipal Law. All Constitutional and statutory provisions are set forth in Appendix "A," *infra*, at pp. 26-35.

STATEMENT OF THE CASE

A. The Parties.

Petitioners are residential and business tenants in the so-called "Lincoln Square" project area on the West Side of Manhattan, which runs from 60th Street to 70th Street, is bounded on the east and west by various streets, and consists altogether of 13 city blocks.

On November 29, 1957 petitioners instituted this litigation to enjoin the City of New York and certain city officials from taking further action with respect to the Lincoln Square Urban Renewal plan and to obtain a declaratory judgment that the plan was in violation of both Federal and State Constitutions.[3] Respondents are the City of New York, various members of the City's Board of Estimate, and Robert Moses, Chairman of the City's Committee on Slum Clearance. Fordham University, the Lincoln Center for the Performing Arts, Inc., and Webb & Knapp Lincoln Square Corporation intervened below (R. 2), and are designated here as "intervenors-respondents."

B. The "Lincoln Square" Urban Renewal Plan.

On April 19, 1954 the Committee on Slum Clearance of the City of New York (hereinafter referred to as "Committee") requested authority from the New York City Board of Estimate (hereinafter referred to as "Board of Estimate") to obtain Federal Funds under Title I of the "Housing Act of 1949" for an urban renewal study of the Lincoln Square area. In October, 1955, after obtaining Federal planning funds, the Committee solicited sponsors to redevelop the area (R. 14, 106). One of the sponsors was Fordham University, which assured the City that it would purchase a site in excess of 300,000 square feet for collegiate purposes (R. 30). Preliminary bids for tentative sponsorship were closed on October 17, 1955 (R. 169), and rede-

[3] 64th Street Residences, Inc., and 89 Amsterdam Avenue Corp., who had brought suit in a "tax-payer's action" under Section 51 of the New York General Municipal Law (R. 10), and who along with petitioners were plantiffs-appellants below, are not included as "petitioners" here. Petitioners either reside or do business in that area which was condemned by the City and then sold to Fordham University (R. 18-20).

velopment and site plans were formulated on the "reuse" basis required by the tentative sponsors (R. 14-15, 34, 149-153, 155-157).

On May 28, 1956 the Committee submitted a report to both the Mayor and the Board of Estimate in which Fordham University was designated as the tentative sponsor for the area bounded by West 60th Street, Amsterdam Avenue, West 62nd Street and Columbus Avenue (R. 149-150).[4] On September 27, 1956 the Board of Estimate granted the Committee authority to present and further process the plan with the Federal Urban Renewal Administration. In granting this authority, the Board acted upon the aforesaid Report and upon a communication from the Chairman of the City Planning Commission, which stated:

> "The proposed redevelopment plan includes the provision of an educational site for the Fordham University Downtown Center, comprising the schools of Law, Education, Business and Social Service. Adjacent to this development there is to be established a musicial and entertainment center including an opera house, a concert hall and several theatres * * *. The plan includes a housing development comprising twelve 20-story buildings providing a total of 4,080 dwelling units." (R. 173).

The site plan set forth in the Committee Report of May 28, 1956 contained the designation "Fordham University" for the area bounded by West 60th Street, Columbus Avenue, West 62nd Street and Amsterdam

[4] The report stated that Fordham University would erect a group of school buildings, comprising the schools of law, education, business and social service, on that site (R. 150)

Avenue (R. 149-150), but no reference, as such, to a "collegiate site" or "educational site."

In November, 1956, persons, other than petitioners, instituted litigation to enjoin further processing of the plan on the basis of Fordham University's participation,[5] at which point the Committee advised Skidmore, Owings & Merrill, coordinating architects for the project, to delete the name of Fordham University from the Site Plan which was being republished as part of a relocation brochure being issued by the Committee for the information of owners and tenants withing the area (R. 152).[6] On August 22, 1957, the Board of Estimate referred the final plan to the City Planning Commission and, after public hearings, on September 11, 1957, the Commission approved the project as an entity and made the findings required by Section 72-k of the New York General Municipal Law (R. 29). Approval was issued in a report of the City Planning Commission dated October 2, 1957 (R. 29, 75).[7]

On October 25, 1957 the Board of Estimate held public hearings on the final approval of the project. On

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[5] See, *Loebner* v. *City of New York*, —— Misc. 2d ——, 162 N.Y.S. 2d 233, dismissed as premature on March 6, 1957.

[6] Similar instructions were given for the deletion of the name of St. Matthew's Roman Catholic Church, another sponsor whose participation was made the basis of a challenge in the *Loebner* case (op. cit., *supra*, ftn. 5), and substitution of the word "institution" (R. 152).

[7] However, in this report, the Site Plan, reproduced as an appendix thereto, redesignated the area bounded by West 60th Street, Columbus Avenue, West 62nd Street and Amsterdam Avenue as "Fordham University" and "Educational Units," and the building outline originally delineated for St. Matthew's Roman Catholic Church was no longer designated as "institution" but instead as "Church" (R. 43, 152).

November 26, 1957 the Board passed a series of resolutions approving (1) the Lincoln Square Urban Renewal plan in its entirety, (2) the acquisition of the project area, (3) the execution of a capital grant contract with the Federal Government, and (4) approving the sponsorship agreements with the various sponsors, including Fordham University (R. 29, 37-41). The agreement with Fordham University obligated Fordham to bid a minimum amount of $2,241,610 at the public auction, and, if successful, to redevelop the site in accordance with the terms of the redevelopment plan. The sponsorship contract also provided for a purchase money mortgage of 65%, to be given by Fordham to the City of New York, as mortgagee (R. 160). In turn, the City obligated itself to acquire the site by purchase or condemnation and to sell it to Fordham if it was the highest bidder at the public auction held pursuant to Section 72-k of the New York Municipal Law (R. 50, 63, 68).[8]

In addition to the collegiate site, the redevelopment plan for the Lincoln Square Urban Renewal Project contains, along with other area sites, a site for a performing arts center (R. 27). The performing arts center is bounded by West 62nd Street, Amsterdam Avenue, West 65th Street and Columbus Avenue (R. 27). The City of New York entered into a sponsor-

[8] In New York City, the so-called "public auction" is one of form only. In "every previously processed Title I project in the City of New York," and in the Lincoln Square Project, as well, not only did the sponsor" * * * [purchase] the site specified in the sponsorship contract at the public auction for the amount set forth in the sponsorship contract," but in addition "there has never even been a bidder other than the designated sponsors." These facts, alleged on p. 31 of the Record, have never been challenged by respondents.

ship agreement with Lincoln Center for the Performing Arts, Inc. (R. 101), which agreed to bid at least $3,993,677.20 at the public auction. The sponsorship agreement and conditions of sale required redevelopment by the erection of a concert hall and an opera house. The negotiated minimum agreed bid for the performing arts center was $10.60 per square foot. The negotiated minimum agreed bid for the collegiate center was $7.00 per square foot (R. 130). On December 26, 1957, the Federal Housing and Home Finance Agency granted approval to the plan, and on February 28, 1958 the City obtained title to the Lincoln Square site by order of condemnation. On the afternoon of February 28, 1958 the City auctioned the "collegiate," "performing arts," and other area sites. The only bidders were the designated sponsors. The amounts bid were the minimum prices previously established by the sponsorship agreements.[9] The approximate cost of site acquisition, as estimated by the Committee on Slum Clearance, is $16.00 per square foot (R. 15, 75).

Respondents concede that Fordham University is conducted by members of the Society of Jesus, a religious order of the Roman Catholic Church, and that while enrollment is not limited to students of the Catholic Faith, courses in the Catholic Religion are conducted in certain of its schools (R. 73, 105, 118).

C. Court Proceedings.

On November 29, 1957 petitioners moved, in Special Term, New York Supreme Court, New York County, for a temporary injunction restraining respondents

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[9] It could hardly have been otherwise. Op. cit., *supra*, ftn. 8. The City was well aware that Fordham University would be the only educational institution to bid for the collegiate site (R. 153).

from acquiring the Lincoln Square area by condem
tion or otherwise. Service of the summons and co
plaint was made December 2, 1957 and answers w
served December 9, 1957. By separate orders dat
respectively December 9 and December 12, 1957,
spondents-intervenors, Fordham University, Linc
Center for the Performing Arts, Inc., and Webb
Knapp Lincoln Square Corporation, were permitt
to intervene in the action and to serve answers to t
complaint (R. 2).

Respondents thereupon moved for dismissal of t
complaint, judgment on the pleadings, and summa
judgment pursuant to Rule 106, 112 and 113 of the N
York Rules of Civil Practice. Petitioners cross-mov
for summary judgment pursuant to Rule 113 of t
New York Rules of Civil Practice. On December 2
1957 the Special Term of the New York Supreme Cou
New York County, granted respondents' motion f
summary judgment and dismissed petitioners' co
plaint (R. 207). On February 20, 1958 the Appella
Division of the New York Supreme Court, First Jud
cial Department, unanimously affirmed, without opi
ion (R. 212-214), and on May 1, 1958 the New Yo
Court of Appeals, in a written opinion annexed here
as Appendix "B" *infra*, at pp. 35-39, affirmed th
determination of the Appellate Division.

D. Statement Under Supreme Court Rule 23(f).

The Federal questions which petitioners ask thi
Court to review were specifically raised, in the firs
instance, in paragraphs Eighteenth through Twenty
eighth of the complaint (R. 17-22),[10] and in the affidavi

[10] Except Queston 4, which is raised by the constitutional cha
lenge to the statutes *as applied*, *i.e.*, to the Lincoln Square Urba

of Sidney Diel-stein, submitted in support of petitioners' motions for temporary injunction and summary judgment (R. 25-26, 31-32, 34-36). The opinion of the Special Term of the New York Supreme Court, New York County, specifically ruled on all the Questions Presented for review by this Court (R. 200-207). The Appellate Division of the New York Supreme Court, First Judicial Department, affirmed the ruling of the Special Term without opinion (R. 212-214). All the questions presented were raised in the memoranda of law submitted by petitioners to Special Term, and in the briefs submitted to the Appellate Division and the Court of Appeals. Similarly, the opinion of the New York Court of Appeals, annexed hereto as Appendix "B", *infra*, at pp. 35-39, deals with all of the questions presented in this Petition for Certiorari.[11]

REASONS FOR GRANTING THE WRIT

The issues which this Court is asked for the first time to decide arise from Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and raise questions of fundamental importance to the Government of the United States, various state and municipal governments, our democratic society, and thousands of real property owners and residental and business tenants who are and will

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Renewal Project "being carried on pursuant to the provisions of Title I of the Federal Housing Act of 1949, as amended, 42 U.S.C. § 1450, *et seq.*, and § 72-k of the General Municipal Law of the State of New York" (R. 26). These allegations are set forth in paragraphs Third, Fourth and Eighteenth of the complaint (R. 11-12, 17).

[11] For pertinent quotations of specific portions of the rulings of the Court below, see Point I(1), (2) and (3), *infra*, at pp. 15, 18, 20, Point II(1), *infra*, at pp. 21-22.

be affected thereby. The decision of the New York Court of Appeals permits the City of New York to condemn an area as "substandard and unsanitary," and to sell a part thereof to a Roman Catholic institution at a previously negotiated price approximately 3½ million dollars less that the price to be paid by the City. Petitioners, and hundreds of others, are immediately affected, for to make way for a new campus for Fordham University—a Roman Catholic institution, they are now required either to vacate their respective homes and premises, or to lose their respective businesses (R. 18-20).

The three basic constitutional questions involved in this case are (1) whether in the light of the First and Fourteenth Amendments a religious institution is prohibited from participating in an urban renewal redevelopment project under Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and Section 72-k of the New York General Municipal Law, unless it pays the full acquisition cost of that portion of the project it obtains; (2) whether *in the circumstances of this case (i.e.*, where (a) a "re-use" restriction for "educational purposes" of part of the project area was specifically adopted upon the religious institution's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the price negotiated between the City and the religious institution was higher than the "re-use" value of the real property in the light of the "re-use" restriction adopted as aforesaid, but lower than the property's "acquisition cost"), the principles underlying the doctrine of "separation between church and state" prohibited the sale by the City of the property to the religious institution at less than the cost

of acquisition; and (3) whether *in the circumstances of this case* (*i.e.*, where (a) the "re-use" restriction for "educational purposes" of a portion of the project area was adopted solely upon the religious institution's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the City knew that no other educational institution would bid for the restricted site at the public auction), the condemnation of the project area and the auction at which the religious institution was the only bidder (at the previously negotiated price) constituted the taking of private property for a non-public use in violation of the Fourteenth Amendment to the Constitution.

I

The New York Court of Appeals Has Decided Federal Questions of Substance Not Heretofore Determined By This Court.

Under Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, Congress attempted to meet the problem of slum clearance by *subsidizing* the cost of clearing blighted or deteriorating land in central areas of theNation's major cities on a two-to-one sharing formula, "the Federal Government making up two-thirds of the loss and the local government making up one-third." *S. Rep. No. 84 on S. 110*, 81st Cong., 1st Sess., at p. 13 (1949). The purpose of "Title I" was to subsidize and encourage private enterprise to clear and redevelop slum areas.[12] And while the expenditure of Federal and

[12] *S. Rep. No. 84 on S. 110*, 81st Cong., 1st Sess., pp. 10-15 (1949); *H. Rep. No. 590 on H. R. 4009*, 81st Cong., 1st Sess., pp. 13-17 (1949); *S. Rep. No. 1472 on H. R. 7839*, 83rd Cong., 2d Sess., pp. 35-41 (1954); *H. Rep. No. 1429 on H. R. 7839*, 83d Cong., 2d Sess., pp. 22-25 (1954).

municipal funds, and the use of the municipality's power of eminent domain, to accomplish slum clearance and redevelopment is unquestionably in the public interest, implicit in these expenditures, as well as in the power of eminent domain, is the subsidy and benefit which private redevelopers receive as a result of Federal and state action.

Petitioners contend that the participation of Fordham University in New York City's "*Lincoln Square* Urban Renewal Project," both by reason of Title I of the "Housing Act of 1949" and Section 72-k of the New York General Municipal Law, was a direct violation of the "establishment of religion" clause of the First Amendment, and the "due process" clause of the Fourteenth Amendment. In the face of this challenge, the New York Court of Appeals held the City's action valid, stating that while "[Fordham], of course, [is] getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners * * * [t]he city benefits by the achievement of its valid municipal purpose of eliminating a slum." Appendix "B," *infra*, at pp. 38-39. Whether or not the City benefits by eliminating a slum area, we think (1) that the principles underlying the doctrine of "separation between Church and State" prohibited the sale of part of that slum to a Roman Catholic institution at a negotiated price, approximately 3½ million dollars less than the price to be paid by the City (especially where two-thirds of the 3½ million dollar loss will be borne by the Federal Government), and (2) that as construed by the Court below, Title I of the "Housing Act of 1949," 63 Stat. 413, as

amended, 42 U.S.C. § 1441, *et seq.* and section 72-k of the New York General Municipal Law are unconstitutional as being in violation of the First and Fourteenth Amendments, respectively.

(1) The New York Court of Appeals held that under Title I of the "Housing Act of 1949" and Section 72-k of the New York General Municipal Law a sale to a religious institution "at $7 per square foot of *land for which* the City [will pay] about $16 per square foot would [not] be an unconstitutional grant or subsidy to a religious corporation." Appendix "B," *infra*, at p. 38. The Court said:

> "The State and Federal statutes contemplate that the purchaser from the city will pay less than the city has paid since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes." Appendix "B," *infra*, at p. 39.[13]

The question, whether, in the light of the First and Fourteenth Amendments a religious institution is prohibited from participating in an urban renewal redevelopment project under Title I of the "Housing Act of 1949" and Section 72-k of the New York General

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[13] Section 103(c)(4) of the "Housing Act of 1949," as amended, permits the City to dispose "of any property acquired in the urban renewal area * * * at its fair value for uses in accordance with the urban renewal plan." 70 Stat. 1097, 42 U.S.C. § 1460 (c)(4). Section 72-k of the New York General Municipal Law authorizes the City to dispose of such property "at the highest marketable price," the deed or instrument of conveyance requiring the purchaser "to clear, plan, reconstruct or rehabilitate such property in such manner as may be prescribed by the Board of Estimate * * *."

Municipal Law (unless it pays the full acquisition cost of that portion of the project it obtains), is in our view, *a Federal question of substance not heretofore decided by this Court.*

The urban renewal and redevelopment program established by Title I of the "Housing Act of 1949," as amended, was the outgrowth of five years of Congressional investigation as to the "persistence of widespread slums and blighted areas in cities, large and small, throughout the Nation."[14] The question decided by the New York Court of Appeals affects not only "cities, large and small, throughout the Nation" but it raises a serious and basic constitutional problem involving the "establishment of religion" clause of the First Amendment. Directly affected is the Federal Government, which will be required to shoulder two-thirds of a direct subsidy of about 3½ million dollars to a religious institution. Property owners, and business and residential tenants in various cities throughout the Nation, will be affected, too.

The important constitutional question passed on by the highest Court of New York requires an accommodation of the power of Congress to aid cities in eliminating slums and blighted areas and to provide standards for redevelopment on a balanced and integrated community basis with principles embodied in the "establishment of religion" clause of the First Amendment. In *Berman* v. *Parker*, 348 U.S. 26, this Court said that it was within the power of Congress to authorize the District of Columbia Land Redevelopment Agency to attack the problem of slum clearance on an area or regional basis and to redesign the area

[14] *S. Rep. No. 84 on S. 1070*, 81st Cong., 1st Sess., p. 19 (1949).

"so that a balanced integrated plan could be developed for the region, including not only new houses, but also schools, *churches,* parks, streets, and shopping centers." *Id.,* at pp. 34-35 [Emphasis supplied]. But equally important is what this Court did not say. *Berman* v. *Parker* does not hold that in developing a balanced intergrated plan for the region, the District of Columbia Land Redevelopment Agency could sell a portion of the community redevelopment project to a *church* "at $7 per square foot of land for which the [Agency will pay] about $16 per square foot * * *." An accommodation of the legitimate powers of the Congress and of the legislative bodies of the various states and cities in attacking the problem of slum clearance and urban redevelopment with the constitutional principle establishing "a wall of separation between church and state" was not made in the *Berman* case. Neither was it made in the decision of the New York Court of Appeals in this case. In our view, an accommodation of these competing, but not necessarily conflicting, interests should be made by this Court. And in making that accommodation, we think this Court will hold that a religious institution may not participate in an urban renewal redevelopment project unless it pays the full acquisition cost of that portion of the project it obtains.

(2) The New York Court of Appeals held that the City's action did not constitute a violation of the constitutional proscription against grants of public moneys to a religious institution despite the fact that (a) a "re-use" restriction of part of the project area was specifically adopted upon the religious institution's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the price negotiated

between the City and the religious institution, while higher than the "re-use" value of the real property in the light of the "re-use" restriction adopted as aforesaid, was lower than the "acquisition cost" of the property obtained. The Court said:

> "Fordham University agreed * * * to bid, for the two-block part set aside for 'educational purposes', at least * * * $7 per square foot, which was higher than the 're-use value' fixed by any of the several appraisals. * * * After the institution of this suit, the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. * * * Plaintiffs say that because the city arranged to sell this land at a price much below what the city [will pay] for it, this necessarily amounts to a subsidy or gift. But what the city bought is not the same as what Fordham bought. The City bought land and buildings * * *. What Fordham was paying for was the re-use value of the land [~~for~~ collegiate purposes] * * * [at] $7 per square foot * * * [a sum] at least equal to the re-use value as established by several appraisals * * *. Therefore * * * Fordham is [not] getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use." Appendix "B," *infra*, at pp. 36-38.

In our view, where (a) the "re-use" restriction of a part of the project area for "educational purposes"

was specifically adopted upon Fordham's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the negotiated sale price was higher that the "re-use" value of the property as "restricted" for Fordham's "re-use", but was lower than the "fair market value"[15] of the property (or, in Judge Desmond's words: "at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners * * *," Appendix "B," *infra*, at p. 38), the condemnation of the property by the City and its sale to Fordham for a sum about 3½ million dollars lower than its cost of acquisition was prohibited by the First and Fourteenth Amendments. While the New York Court of Appeals held otherwise, this Federal question of substance is obviously one for this Court to decide.

(3) The New York Court of Appeals held that the condemnation of the project area and the auction at which the religious institution was the only bidder (at the previously negotiated price) did not constitute a taking of private property for a non-public use in violation of the Fourteenth Amendment, regardless of the fact that (a) the "re-use" restriction of a part of the project area for "educational purposes" was adopted solely upon the religious institution's argeement to act as sponsor and redeveloper of that portion of the project and (b) at the time it approved the project plan, the City knew that no other educational institution would bid for the restricted site at the public auction required by Section 72-k of the New

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[15] As used here, the term "fair market value" is synonymous with "acquisition cost." See, *e.g.*, *United States* v. *Miller*, 317 U.S. 369, 374.

York General Municipal Law (R. 153). The Court said:

> "The City benefits by the achievement of its valuable municipal purpose of eliminating a slum. * * * At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected." Appendix "B," *infra*, at pp. 38-39.

This Federal question is one of substance. And while this Court has not heretofore passed on it in the factual context of this case, we recognize that review may be unavailable because of *Berman* v. *Parker*, 348 U.S. 26. If the *Berman* case means that the character of the "non-public use" to which real property is put after seizure is always irrelevant when a valid public purpose is achieved by eliminating a slum, then review of this question has been foreclosed. But if the *Berman* case means that the *taking* of title to real property for a public purpose is within the power of eminent domain, *provided* that the subsequent non-public use to which the property is put is (a) expressly or impliedly authorized and (b) not otherwise invalid, then this Court should review this question. While the judicial role in determining whether the power of eminent domain is being exercised for a public purpose is a narrow one, we think it not so narrow as to permit a *taking* of the private property of one person for the private use of a religious institution even though a public purpose was achieved as an incidental by-product. Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 6-7; *Brown* v. *United States*, 263 U.S. 78, 83-84.

II

The New York Court of Appeals Has Decided Federal Questions of Substance in a Way Probably Not in Accord With the Applicable Decisions of This Court.

(1) This action was instituted in the New York Supreme Court to enjoin the City from taking further action with respect to the Lincoln Square Urban Renewal Project Plan and to obtain a declaratory judgment that the plan was in violation of both Federal and State Constitutions. While no direct attack on the constitutionality of Title I of the "Housing Act of 1949" or Section 72-k of the New York General Municipal Law, was made in petitioners' complaint,[16] those statutes, as construed by the opinion of Mr. Justice McGivern at the Special Term, New York Supreme Court, New York County (R. 200-207), squarely raised the question whether, in the light of the First and Fourteenth Amendments, a religious institution was prohibited from participating in an urban renewal redevelopment project under Title I of the "Housing Act of 1949," and Section 72-k of the New York General Municipal Law (R. 201). Judge McGivern said:

> "The intendment of such statutes is to throw an arm of protection around a whole community and to uplift it, not to ward off some units of the community because of accidental factors such as creed.

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[16] The constitutional challenge was directed to the statutes *as applied*, *i.e.*, to the Lincoln Square Urban Renewal Project "being carried on pursuant to the provisions of Title I of the Federal Housing Act of 1949, as amended, 42 U.S.C. § 1450, *et seq.*, and Section 72-k of the General Municipal Law of the State of New York" (R. 26). These allegations are set forth in Paragraphs Third, Fourth and Eighteenth of the complaint (R. 11-12, 17).

> And assuredly, the intergation of Fordham in such a vast development as Lincoln Square is not a step towards the establishment of a national religion, offensive to the First Amendment of the Federal Constitution. Public welfare legislation, such as the slum clearance law before us and the acts taken thereunder, which extend the general benefit of New York State law 'to all its citizens without regard to their religious belief' are not to be considered as establishments of religion (Everson v. Board of Education, 330 U.S., 1, 16 [1947]). Nor have our courts ever temporized with rejecting arguments that state action was aiding in the establishment of religion where concurrence would result in the encroachment upon the free exercise of religion." (R. 205)

When this issue reached the New York Court of Appeals, that Court held that both the State and Federal statutes contemplated that the purchaser from the City would pay less than the City had paid, since it would "always be the case that the City is buying land and buildings, and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes." The Court of Appeals held the City's action valid, stating that while

> "* * * [Fordham], of course, [is] getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay than if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum." Appendix "B", *infra*, at p. 38.

We think it clear that the New York Court of Appeals has decided this Federal question of substance in a way in conflict with the applicable decisions of this Court. See, *Everson* v. *Board of Education*, 330 U.S. 1; *McCollum* v. *Board of Education*, 333 U.S. 203; and *Zorach* v. *Clauson*, 343 U.S. 306.

(2) The New York Court of Appeals held that *in the circumstances of this case* the City's action did not constitute a violation of the doctrine of "separation between church and state," as embodied in the "establishment of religion clause" of the First Amendment, and the "due process" clause of the Fourteenth Amendment. Not only was this ruling a decision on a Federal question of substance not heretofore decided by this Court (see, Point I(2), *supra*, at pp. 17-19), but in our view it was a ruling in conflict with the principles established by this Court in *Everson* v. *Board of Education*, *supra*; *McCollum* v. *Board of Education*, *supra*, and *Zorach* v. *Clauson*, *supra*.

CONCLUSION

The fundamental importance of this case is pointed up by a letter of the Federal Housing and Home Finance Administrator to the Mayor of the City of New York on July 25, 1957. With reference to the Lincoln Square Urban Renewal Project, the Federal Administrator stated:

> "The point at issue concerns the determination of fair reuse value as required by Title I of the Housing Act of 1949 of lands to be sold to redevelopment sponsors in the Lincoln Square project area. As you probably know, this project is still in planning and has not yet been put under Federal capital grant contract. About six months ago, Mr. Moses's staff was advised that this Agency

would require an appraisal by appraisers selected by the Agency, in addition to the usual two appraisals to be submitted by the Committee on Slum Clearance. *We have taken this position because of deficiencies in the first appraisal submitted by the Committee, the large amounts of money involved in the Lincoln Square project, and nation-wide public concern that a religious institution might be publicly subsidized by the sale of land at less than fair value. Moreover, the project proposals do not appear to assure the broad competition for the project sites which would otherwise tend to make certain that fair value would be determined in the market place.*" [Emphasis supplied.] (R. 156-157)

While the concern of the Federal Housing and Home Finance Administrator resulted in an increase in price which Fordham paid for that portion of the project area it obtained, and while the Administrator did grant final approval to the project on December 26, 1957, this letter demonstrates that the issues raised by this case are of "nation-wide public concern." We think the Federal questions of substance presented here for the first time should be resolved by this Court, not merely because the issues are of "nation-wide public concern," but because such issues pose grave legal questions of fundamental importance to the Government of the United States, various state and municipal governments, and thousands of real property owners and residential and business tenants throughout the Nation.

FOR THE FOREGOING REASONS THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX "A"

Constitution

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

Section 2 of the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1441.

"The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution

toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid * * *. The Housing and Home Finance Agency and its constituent agencies, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist * * * (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities * * *."

Title I, Section 100 of the Housing Act of 1949, as amended, 68 Stat. 622, 42 U.S.C. § 1450.

"The authorizations, funds, and appropriations available pursuant to sections 1452 and 1453 of this title shall constitute a fund, to be known as the "Urban Renewal Fund," and shall be available for advances, loans, and capital grants to local public agencies for urban renewal projects in accordance with the provisions of this subchapter * * * ."

Title I, Section 101 of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1451.

"(a) In entering into any contract for advances for surveys, plans and other preliminary work for projects under this subchapter, the Administrator shall give consideration to the extent to which appropriate local public bodies have undertaken positive programs (through the adoption, modernization, administration, and enforcement of housing, zoning, building and other local laws, codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings, including the use and occupancy of dwellings) for (1) preventing the spread or recurrence in the community of slums and blighted areas, and (2) encouraging housing cost reductions through the use of appropriate new materials, techniques, and methods in land and residential planning, design, and construction, the increase of efficiency in residential construction, and the elimination of restrictive practices which unnecessarily increase housing costs.

"(b) In the administration of this subchapter, the Administrator shall encourage the operations of such local public agencies as are established on a State, or regional (within a State), or unified metropolitan basis or as are established on such other basis as permits such agencies to contribute effectively toward the solution of community

development or redevelopment problems on a State, or regional (within a State), or unified metropolitan basis.

"(c) No contract shall be entered into for any loan or capital grant under this subchapter * * * unless (1) there is presented to the Administrator by the locality a workable program (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life) for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program, and (2) on the basis of his review of such program, the Administrator determines that such program meets the requirements of this subsection and certifies to the constituent agencies affected that the Federal assistance may be made available in such community * * *."

Title I, Section 102 of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1452.

"(a) To assist local communities in the elimination of slums and blighted or deteriorated or deteriorating areas, in preventing the spread of slums, blight or deterioration, and in providing maximum opportunity for the redevelopment, rehabilitation, and conservation of such areas by private enterprise, the Administrator may make temporary and definitive loans to local public agencies in accordance with the provisions of this subchapter for the undertaking of urban renewal projects. * * *

"(d) The Administrator may make advances of funds to local public agencies for surveys of urban areas to determine whether the undertaking of urban renewal projects therein may be feasible and for surveys and plans for urban renewal projects which may be assisted under this subchapter, including, but not limited to, (i) plans for carrying out a program of voluntary repair and rehabilitation of buildings and improvements, (ii) plans for the enforcement of State and local laws, codes and regulations relating to the use of land and the use and occupancy of buildings and improvements, and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements, and (iii) appraisals, title searches, and other preliminary work necessary to prepare for the acquisition of land in connection with the undertaking of such projects. * * * "

Title I, Section 105 of the Housing Act of 1949, 63 Stat. 416, as amended, 42 U.S.C. § 1455

"Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

"(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; and (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole;

"(b) When real property acquired or held by the local public agency in connection with the project is sold or

leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such property required by the urban renewal plan; and (iii) to comply with such other conditions as the Administrator finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this title * * *;

"(c) There be a feasible method for the temporary relocation of families displaced from the urban renewal area, and that there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and reasonably accessible to their places of employment.

"(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

Title I, Section 110 of the Housing Act of 1949, 63 Stat. 420, as amended, 42 U.S.C. § 1460.

"(a) 'Urban renewal area' means a slum area or a blighted deteriorated, or deteriorating area in the locality involved which the Administrator approves as appropriate for an urban renewal project.

"(b) 'Urban renewal plan' means a plan, as it exists from time to time, for an urban renewal project, which plan (1) shall conform to the general plan of the locality as a whole and the workable program referred to in sec-

tion 1451 of this title and shall be consistent with definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements.

"(c) 'Urban renewal project' or 'project' may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with such urban renewal plan. Such undertakings and activities may include—

(1) acquisition of (i) a slum area or a deteriorated or deteriorating area, or (ii) land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominantly residential uses: *Provided*, That the requirement in paragraph (a) of this section that the area be a slum area or a blighted, deteriorated or deteriorating area shall not be applicable in the case of an open land project;

(2) demolition and removal of buildings and improvements;

(3) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improve-

ments necessary for carrying out in the urban renewal area the urban renewal objectives of this subchapter in accordance with the urban renewal plan;

(4) disposition of any property acquired in the urban renewal area (including sale, initial leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan; * * *

(6) acquisition of any other real property in the urban renewal area where necessary to eliminate unhealthful, insanitary or unsafe conditions, * * * or otherwise to remove or prevent the spread of blight or deterioration, or to provide land for needed public facilities. * * *

* * *

"In addition to all other powers hereunder vested, where land within the purview of clause (1) (ii) or (1) (iii) of the first paragraph of this subsection (whether it be predominantly residential or nonresidential in character) is to be redeveloped for predominantly nonresidential uses, loans and advances under this subchapter may be extended therefor if the governing body of the local public agency determines that such redevelopment for predominantly nonresidential uses is necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and to afford maximum opportunity for the redevelopment of the project area by private enterprise; * * *."

New York General Municipal Law, Section 72-k.

"1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition, of real property

by such municipal corporation, real property or any in-
terest therein necessary for or incidental to the clearance,
replanning, reconstruction, and neighborhood rehabilita-
tion of substandard and insanitary areas, together with
adequate provision for recreational and other facilities
appurtenant thereto.

"2. In addition to employing any other lawful method
of utilizing or disposing of any real property or any in-
terest therein owned by a municipal corporation, or ac-
quired by it pursuant to subdivision one of this section,
such municipal corporation, acting through its board of
estimate or other governing body, may sell, lease for a
term not exceeding ninety-nine years, or otherwise dispose
of any such real property to any person, firm, or corpora-
tion at the highest marketable price or rental at public
auction or by sealed bids pursuant to the provisions of
any general, special or local law applicable to the sale or
disposition of real property by such municipal corpora-
tion, for the purpose of clearance, replanning, reconstruc-
tion and neighborhood rehabilitation by the purchaser of
such real property in substandard and insanitary areas
in such manner as may be prescribed by the board of esti-
mate or other governing body. Any deed, lease or instru-
ment by which real property or any interest therein is
conveyed or disposed of in such manner shall contain pro-
visions requiring the purchaser or grantee to clear, replan,
reconstruct or rehabilitate such property in such manner
as may be prescribed by the board of estimate or other
governing body, and provisions insuring the use of such
real property for purposes consistent with the clearance,
replanning, reconstruction and neighborhood rehabilitation
of substandard and insanitary areas. Such deed or instru-
ment may contain such other provisions, conditions and
restrictions, including specifications relating to clearance,
replanning, reconstruction, and rehabilitation as may be
prescribed by the board of estimate or other governing
body. The prior consent of the city planning commissio

or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a sub-standard and insanitary area.

"3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governing body, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen hundred forty-nine and all federal laws amendatory and supplemental thereto; * * *"

APPENDIX "B"

STATE OF NEW YORK

COURT OF APPEALS

No. 87

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, & ors.,&c., *Appellants*,

v.

CITY OF NEW YORK, & ors.,&c., *Respondents*,

FORDHAM UNIVERSITY, & ors., *Intervenors-Respondents*.

Opinion for Affirmance

DESMOND, J.:

Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west

side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of thirteen city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, certiorari denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (12 U. S. Code, § 1701 et seq.), the city's Board of Esti.. .te presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts, Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price with the city taking back a purchase-

money mortgage for part of the price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (42 U. S. Code, § 1450 et seq.), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of three and a half million dollars in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a

cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, cl. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city paid about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city paid for it, this necessarily amounts to a subsidy or gift. But what the city bought is not the same as what Fordham bought. The city bought land and buildings. Fordham bought the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham was paying for was the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay than if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and

Federal statutes contemplate that the purchaser from the city will pay less than the city has paid since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

At some points in their argument plaintiffs seems to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kassel* v. *Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion but representing the whole court's views on that question; and see *Bleecker* v. *Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

• • •

Judgment affirmed, with costs. Opinion by Desmond, J. All concur.

APPENDIX "C"

No. 87

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, & ors.,&c., *Appellants*,

v.

CITY OF NEW YORK, & ors.,&c., *Respondents*,

FORDHAM UNIVERSITY, & ors., *Intervenors-Respondents*.

BE IT REMEMBERED, That on the 13th day of March in the year of our Lord one thousand nine hundred and fifty-eight, 64th St. Residences and 89 Amsterdam Avenue Corportion, suing under Section 51, General Municipal Law, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Harris L. Present, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, & ors., &c., the residents and Fordham University, & ors., the intervenors-respondents in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, Saxe, Bacon & O'Shea, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Harris L. Present, of counsel for the appellants, and by Mr. Anthony Curreri, of counsel for the respondents, and by Mr. Porter R. Chandler, of counsel for the intervenor-respondent Fordham University, and by Mr. William Eldred Jackson, of counsel for the intervenor-respondent Lincoln Center, submitted by the intervenor-respondent Webb & Knapp, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate

Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE
Albany, May 1, 1958

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

Supreme Court of the United States

October Term 19[illegible]

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURNE, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC., and SEYMOUR DAMBROT and PHILIP DERMAN, as copartners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, & ORS., &C.,

Respondents,

FORDHAM UNIVERSITY & ORS.,

Intervenors-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term 1957

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners.

v.

CITY OF NEW YORK, & ORS., &C.,

Respondents.

FORDHAM UNIVERSITY, & ORS.,

Intervenors-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, City of New York, and others, for their statement in opposition to petitioners' application for a writ of certiorari, respectfully show the following:

1. Statement of the Issues

Under the First Amendment to the Federal Constitution, is a religious institution barred from participating in an urban renewal project unless the price paid by it for land acquired by it at public auction subsequent to condemnation is at least equal to the City's condemnation cost of the property, although the City acquires in condemnation the land and buildings completely unrestricted in use whereas the religious institution acquires the property sub-

ject to limitations of reuse and is obligated to raze the buildings, relocate the occupants and redevelop the property for limited reuse in accordance with the terms and conditions in the urban renewal plan?

Did the condemnation of the entire project area and the sale of part thereof to a religious institution at public auction constitute the taking of private property for a non-public use, in violation of the Fourteenth Amendment, because the religious institution had, prior to the condemnation of the project site, agreed to make at public auction a minimum bid in excess of the reuse value for that part of the project area set aside for redevelopment for educational purposes?

2. Facts

(A) Legislative Background

The human misery and social evils which are the outgrowth of slum and blighted areas have for many years been the subject of study by governmental agencies and students of sociology. In 1939, for the first time in the history of the State of New York, the New York Constitution granted specific power to the State Legislature to provide "in such manner, by such means and upon such terms and conditions as it may prescribe * * * for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas * * * and for recreational and other facilities incidental or appurtenant thereto" (Art. 18, § 1). For and in aid of such purposes, and "notwithstanding any provision in any other article of this constitution" the Constitution granted the Legislature further powers, among them, the power to authorize eminent domain, and the power "to authorize cooperation with and the acceptance of aid from the United States" (Art. 18, § 2).

In 1945, the State Legislature implemented the Constitutional provision by the enactment of L. 1945, ch. 887

(General Municipal Law, § 72-i, now § 72-k), which authorized a municipal corporation to acquire real property by condemnation or otherwise "necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto".

Because of the vast financial resources required for a slum clearance and redevelopment program, no projects were undertaken by cities pursuant to the 1945 legislation until the enactment of the National Housing Act of 1949, with its financial program to assist cities to eliminate and redevelop slums and blighted areas. Then only did the possibility of implementing the State slum clearance laws become a reality. The New York State Legislature then amended General Municipal Law, § 72-k, to facilitate cooperation by cities with the federal program (L. 1950, ch. 799).

The statutory procedure followed by the City and upheld by the New York Court of Appeals has been to acquire the real property in a substandard and insanitary area and to resell it at public auction to the highest bidders, who are obligated by the terms of their deeds to relocate the tenants from the sites, demolish existing improvements and redevelop the land upon the terms and conditions prescribed by the Board of Estimate of the City of New York and the Federal Urban Renewal Administration.

(B) The Lincoln Square Project

The Lincoln Square Project Plan was adopted by the Board of Estimate pursuant to the statutes described above. It provides for clearance and redevelopment of a 13-block substandard area on the west side of Manhattan just above Columbus Circle (Urban Renewal Plan, annexed as Exhibit A to defendants' answer, not printed pursuant to stipulation). It calls for redevelopment of the area for the following uses: Collegiate, Multi-family residential, Commercial, Retail, Public and Semi-Public (*ibid.*).

There is nothing in the Plan which requires the redeveloper of the collegiate area to be a sectarian institution. By its terms, the Plan permits effectuation by either a non-sectarian or sectarian institution *(ibid.)*.

(C) The Sponsorship Contract

As part of the preliminary procedure established for slum clearance projects, the Slum Clearance Committee, in a widely advertised program, invited preliminary bids from persons or institutions willing to undertake redevelopment of a site in the proposed Lincoln Square area (R.[1] 14, 15, 153, 166). Such sponsors included persons or corporations interested in redeveloping for housing, cultural, commercial, collegiate and institutional purposes. The Board of Estimate approved four of five proposed sponsors, including Fordham University, which executed a sponsorship contract approved by the Board of Estimate, whereby it bound itself to make a minimum bid for a portion of the area to be devoted to educational purposes. The price of $7 a square foot, which Fordham agreed to bid, is in excess of the appraised value for collegiate reuse and is equal to the price to be bid by the housing sponsor in the project for the best commercial use for which the Lincoln Square site could be developed (R. 159). This method of procedure, consisting of the execution of a sponsorship contract and a subsequent open auction sale, has been used by the City in all Title 1 slum clearance projects and has been upheld by the Court of Appeals of the State of New York (see cases cited *post*, p. 11).

The purpose of the sponsorship contract was merely to assure the City that at least one bidder would make a minimum bid at the public sale and that there would be at least one educational institution interested in clearing and redeveloping the collegiate site (R. 62). This is appar-

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[1] The letter "R" refers to the pages of the record as printed for the use of the Court below.

ent from its terms, under which *Fordham could not be the redeveloper unless it was the highest bidder at the public auction* (R. 63; Fordham Sponsorship contract annexed as Exhibit B to defendants' answer, pp. 3, 4, 6 and 7).

The terms of the sponsorship contract also demonstrated that the Project Plan comprehended redevelopment of the collegiate section by *any* educational institution *which might be the highest bidder at public auction* and that it was not limited solely to Fordham as a redeveloper. Thus, the contract provided that the site plan contained therein was *only one of the "possible" plans* which might be utilized for the project (Fordham Sponsorship contract, *id.*, pp. 3, 4, 6, 7, 12).

The fact that the identity of the sponsor under a sponsorship contract is not an essential element of the Plan was also evident: (1) when St. Matthew's Roman Catholic Church withdrew its sponsorship of an institutional area at the very last moment while its sponsorship contract was before the Board of Estimate for approval and the American Red Cross was substituted as a proposed redeveloper of that area and (2) when the Board of Estimate approved the plan without approving a sponsor for one of the housing sections (R. 40).

Thus, all that the Fordham sponsorship contract did was recognize that Fordham had the same right to bid at public auction as was available to all other institutions, sectarian or non-sectarian, and bound Fordham to make a minimum bid—a term inserted for the protection of the City.

Petitioners admitted that there would be no valid constitutional objection to any aspect of the redevelopment plan (1) if the proposed sponsor were Columbia University, New York University or some other non-sectarian college (R. 34-35), or (2) if there were no sponsorship contracts and Fordham University were the successful bidder for

redevelopment of the collegiate area (R. 154). Furthermore, upon oral argument at Special Term, Supreme Court, New York County, petitioners' counsel conceded that there is no prohibition excluding Fordham *per se* from the suggested plan or procedure, assuming Fordham to be the successful bidder at the auction (R. 203-204). Petitioners' attack was therefore directed to the fact that a denominational college was afforded the same opportunity as a nonsectarian institution to execute a sponsorship contract and to bid at public auction for the acquisition and redevelopment of City-owned property in accordance with a slum clearance plan (R. 154).

Even now, before this Court, the petitioners concede that a religious institution would not be constitutionally barred from participating in the plan if it paid "the full acquisition cost [the price the City will pay in the condemnation proceeding to the property owners from whom the property was taken in the exercise of its power of eminent domain] of that portion of the project it obtains" (Petition, p. 12). Elsewhere (*infra*, pp. 9-10) we shall demonstrate how the logical consequences of this concession deprive the questions presented by the petitioners of all substance.

3. Opinion of the New York Court of Appeals

The opinion of the New York Court of Appeals, as it is set out in Appendix "B" to the petition for writ of certiorari, is an unrevised and uncorrected opinion as released, but not for publication. Because of corrections which were subsequently made, we attach the official opinion of that Court to this brief as Appendix "A", *infra*, pp. 15-18.

After reciting the facts, the Court described the action brought by the petitioners as one based upon the contention "that the resale of part of this area [the Lincoln

Square Project site] to Fordham University, a Roman Catholic institution, at a price lower than the price paid[2] by the City will be a direct subsidy in a sum in excess of three and a half million dollars, in violation of Section 7 of Article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public money to denominational institutions" (*infra*, p. 16).

"The argument, however," the Court found, "proceeds on an assumption false in fact" (*infra*, p. 17). The false assumption is that Fordham acquired at public auction the same property that the city acquired in condemnation. As the Court of Appeals pointed out, "what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but *subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only.* What Fordham is paying for is the re-use value of the land. • • • Therefore, there is no substance to the assertion, *on which this whole suit depends*, that Fordham is getting a gift, grant or subsidy of public property" (*ibid.*; italics supplied). As the Court further stated, the city must pay the private owners whose property it has condemned "the full value of the property in its present condition and use", while the purchaser from the city will pay less than the city pays "since it will always be the case

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[2] The "price paid" has not yet been determined. That will be ascertained in the pending condemnation proceeding, which may not be finally concluded for a year or more. It is, however, conceded that the anticipated cost of acquisition to the City will probably exceed the price paid by Fordham.

that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes," and the difference between the two amounts represents the cost of the achievement of the valid public purpose of eliminating a slum (*infra*, pp. 17-18).

The Court then stressed the significant fact that "Any collegiate institution could have been a bidder at the auction" (*infra*, p. 18). This fact, coupled with its finding that the sale at auction to the redeveloper involves an exchange of considerations and not a gift or subsidy, led the Court to the conclusion that no "aid to religion" was involved (*ibid.*).

ARGUMENT

Applicable decisions of this Court, when applied to the questions presented by the petitioner, make it abundantly clear that these questions are not of sufficient substance to warrant review by this Court.

(a)

The questions as urged by the petitioners concede that religious institutions may be permitted to participate in urban renewal projects and that such participation would not involve violation of the First and Fourteenth Amendments. This concession is in accord with this Court's statement in *Berman* v. *Parker*, 348 U. S. 26, 34-35 (1954). It is also in accord with the history and practice of neighborhood planning and redevelopment (R. 50-59) and with the holdings of this and other courts that denominational institutions must be afforded equal right to participate in the benefits of zoning legislation. *Village of University Heights* v. *Cleveland Jewish Orphan Home*, 20 F. 2d 743 (Cir. Ct. 6th Cir., 1927), cert. den. 275 U. S. 569 (1927); *Matter of Diocese of Rochester* v. *Planning Board*, 1 N. Y.

2d 508, 522 (1956); *Matter of Community Synagogue* v. *Bates*, 1 N. Y. 2d 445, 458 (1956). It is also based upon the principles that religious institutions may deal at arm's length with a governmental agency; that where there is an exchange of considerations, there is no gift or subsidy; and finally, that a denial of this right to deal with governmental agencies on this basis would be a denial of the rights of the religious institution under the First Amendment. A fundamental aspect of the protection provided by the First Amendment is found in those cases in which this Court has held that public welfare legislation, such as the slum clearance statute here involved and the acts taken thereunder, which extends the general benefits of State law "to all its citizens without regard to their religious belief", is not to be considered as an establishment of religion. *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947); cf. *Zorach* v. *Clauson*, 343 U. S. 306, 312-313 (1952).

While professing acceptance of these principles, the petitioners nevertheless claim to find their violation in the circumstances of this case, because Fordham acquired the educational site at a price less than its estimated cost to the City. Their contention, however, is based, as the New York Court of Appeals found, upon "an assumption false in fact" (*infra*, p. 17). The petitioners have sought to equate two dissimilar items. What the religious institution acquires at public auction is not the same thing that the municipality acquires upon condemnation of the project site. The municipality pays the private owners the full market value of the buildings and land unrestricted as to use, as of the date of acquisition. What the religious institution or any other redeveloper buys at public auction is land which, under the terms of the sale, it must clear and redevelop for the purpose required by the plan. To do this, it must relocate present occupants, raze the buildings and erect new structures to conform to the site plan, all within time limits fixed by the plan. The land it acquires is also burdened by a restriction limiting its use to educational

purposes. Obviously, therefore, the acquisition cost to the City for elimination of a slum is wholly unrelated to the value of the real property as resold to the redeveloper. Moreover, the record in this proceeding clearly establishes that the price paid by Fordham exceeds the reuse value of the land as restricted to educational purposes. Consequently, there has been a fair exchange of considerations which removes this transaction from the ban of the First Amendment (R. 130; *infra*, p. 18).

This false assumption of the petitioners, upon which their whole case depends, stems from their refusal to recognize that the difference between the cost of acquisition to the municipality and the price paid by the redeveloper at public auction does not represent a gift or subsidy to the redeveloper but is rather a measure of the cost of accomplishing the valid municipal purpose of clearing a slum area and providing for its redevelopment in a manner which will prevent recurrence of the blight. So the courts have held throughout the nation wherever this question has arisen. *State v. Land Clearance Commission*, 270 S. W. 2d 44, 53 (Sup. Ct. Mo., 1954); *Cremer v. Peoria Housing Authority*, 78 N. E. 2d 276, 284 (Sup. Ct. Ill., 1948); *People v. City of Chicago*, 111 N. E. 2d 626, 636 (Sup. Ct. Ill., 1953); *Foeller v. Housing Authority of Portland*, 256 P. 2d 752, 767, Sup. Ct. Ore., 1953); *Velishka v. City of Nashua*, 106 A. 2d 571, 575, 576 (Sup. Ct. N. H., 1954); *Gohld Realty Co. v. City of Hartford*, 104 A. 2d 365, 370 (Sup. Ct. of Errors, Conn., 1954).

(b)

Petitioners further profess to find constitutional objections in the fact that the City, following its usual practice with respect to all tentative sponsors, allocated a portion of the site to educational purposes and, in advance of condemnation, entered into an agreement with Fordham, whereby Fordham bound itself to make a minimum bid at the public auction in an amount concededly in excess of

the re-use value of the land as restricted to educational purposes.

No federal question is thus raised. On the contrary, the question simply involves an interpretation of the State statute, section 72-k of the General Municipal Law of the State of New York. In earlier urban renewal projects, some of which involved secular educational institutions, where attacks were made upon the procedure of obtaining sponsorship contracts from persons willing to undertake redevelopment of the site for the purposes expressed in the plan, the New York Court of Appeals has uniformly upheld such procedures under the Fourteenth Amendment, and has found that the taking was for a valid public purpose and not for private benefit. *Kaskel* v. *Impellitteri*, 306 N. Y. 73 (1953), cert. den. 347 U. S. 934 (1954); *Boro Hall Corp.* v. *Impellitteri* (involving Long Island University), 128 N. Y. S. 2d 804 (Sup. Ct. Kings Co., 1954), aff'd 283 App. Div. 889 (2nd Dept., 1954), leave to appeal denied 307 N. Y. 672 (1954); *Bleecker Luncheonette, Inc.* v. *Wagner* (New York University), 141 N. Y. S. 2d 293 (Sup. Ct., N. Y. Co., 1955), aff'd 286 App. Div. 828 (1st Dept., 1955), leave to appeal denied, 309 N. Y. 1029 (1955). The latest pronouncement of the New York Court of Appeals on this subject is contained in the opinion below (*infra*, p. 18).

The instant case is governed by the long line of cases concerning which this Court, said, in *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 607 (1908):

> "No case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws."

And see the concurring opinion of Mr. Justice FRANKFURTER, in *United States ex rel. T.V.A.* v. *Welch*, 327 U. S. 546, 557 (1946). Since the New York Court of Appeals has in this and other cases upheld the procedures adopted by the City of New York as a taking for public use in conformity

ity with State law, no constitutional question under the Fourteenth Amendment is presented.

(c)

Quite apart from the lack of substance in the questions presented by the petitioners, there remains to be considered whether the petitioners may properly invoke the jurisdiction of this Court. It is crystal clear that the sole basis of the petitioners' alleged grievance is the fact that a portion of the project area was resold by the City at public auction to a religious institution.

Nothing that was presented below or is presented now to this Court affects the validity of the act of condemnation. That was a constitutional exercise of the municipality's power of eminent domain for the public purpose of clearing a slum and providing for its redevelopment in a manner which would prevent recurrence of the blight. The resolutions adopted by the Board of Estimate, the project plan, and the sponsorship agreements at no time prevented competitive bidding by other institutions. Instead, they contemplated the possibility that the respective sponsors might not be the successful bidders by providing that the successful bidder would be permitted to make changes in the manner of redevelopment so long as such changes were consistent with the basic objectives of the plan (*ante*, pp. 4-5).

Thus, it is clear that, whether or not Fordham's participation in the plan is constitutionally valid, the City's act of condemnation and the vesting of title in the City to the entire project area may not be set aside. This being so, it follows that whatever rights of possession the petitioners may have had in the premises as residential tenants and business occupants were cut off by the vesting of title in the City of New York (New York City Administrative Code, Section B15-37.0, the provisions of which are annexed hereto as Appendix P, *infra*, p. 19). The peti-

tioners are not injured by the act of resale to the redevelopers; rather, they will be evicted as the result of condemnation proceedings lawfully maintained by the City. *Allied-City Wide, Inc.* v. *Cole*, 230 F. 2d 827, 828 (Ct. of App., Dist. of Col., 1956). The language of this Court in *Doremus* v. *Board of Education*, 342 U. S. 429, 432-433 (1952) is peculiarly applicable to the petitioners:

> "Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest."

CONCLUSION

The petition for writ of certiorari should be denied.

May 26, 1958.

Respectfully submitted,

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Appendix A

64TH ST. RESIDENCES, INC., et al., Appellants, v. CITY OF NEW YORK et al., Respondents, and FORDHAM UNIVERSITY et al., Intervenors-Respondents.

DESMOND, J. Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of 13 city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (U. S. Code, tit. 12, § 1701 *et seq.*), the city's Board of Estimate presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts, Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such

sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (U. S. Code, tit. 42, § 1450 *et seq.*), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Appendix A

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, par. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and

desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion but representing the whole court's views on that question; and see *Bleecker Luncheonette* v. *Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.

Appendix B

Administrative Code of The City of New York, § B15-37.0

"§ B15-37.0. **Vesting of title; effect of, upon real property contracts.**—a. Where the whole of any lot or parcel of real property, under lease or other contract, shall be taken, all the covenants, contracts and engagements between landlord and tenant or any other contracting parties touching the same, or any part thereof, upon the vesting of title in the city, shall cease and determine and be absolutely discharged. Where part only of any lot or parcel of real properly so under lease or other contract shall be so taken, all contracts and engagements respecting the same, upon such vesting of title, shall cease and determine and be absolutely discharged, as to the part thereof so taken, but shall remain valid and obligatory as to the residue thereof.

b. All persons in possession of such premises at the time of the vesting of title thereto in the city, shall at the option of the city become tenants at will of such city unless within ten days after the vesting of title they shall elect to vacate and give up their respective holdings. Where a person in possession is entitled to an award in such proceeding, the reasonable value of his use and occupancy of the premises, as fixed by agreement, by the court in such proceeding or by any court of competent jurisdiction, during the period between the date of the vesting of title in the city and the date of the actual payment of the award, shall be a lien against such award, subject only to liens of record at the time of the vesting of title in the city."

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILLIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, & ORS., &c.,

Respondents,

and

FORDHAM UNIVERSITY, & ORS.,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR INTERVENOR-RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

Of Counsel:

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1014

Rose K. Harris, Edythe R. Sherrick, and Renee Bouret, suing on behalf of themselves and all others similarly situated, and United Ball Bearing Co., Inc. and Seymour Dambrot and Philip Derman, as co-partners doing business in the name and style of Dambrot & Derman, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

City of New York, & Ors., &c.,

Respondents,

and

Fordham University, & Ors.,

Intervenors-Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR INTERVENOR-RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of the State of New York, New York County, Special Term (hereinafter referred to as "Special Term"), has not been officially reported, but is set forth at pages 200-207 of the record as printed for the court below. The Appellate Division of the Supreme Court of the State of New York, First Department (hereinafter referred to as the "Appellate Division"), unanimously affirmed without opinion the order and judgment of Special Term. See 170 N.Y.S. 2d 993 (not yet officially reported). The opinion of the Court of Appeals of the State of New York (hereinafter referred to as the "Court of Appeals") has not been officially reported, but is set forth in Appendix "B" to the petition herein.

Jurisdiction

Petitioners predicate the jurisdiction of this Court upon 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which petitioners allege to be involved herein are adequately set forth in Appendix "A" to the petition.

Questions Presented

We believe that petitioners do not raise any substantial federal questions here and that all of the questions which they allege to be substantial have already been foreclosed by decisions of this Court.

We further believe that the decision of the Court of Appeals herein does not conflict with any decision of this Court.

Statement

Petitioners and certain others* (hereinafter collectively referred to as "plaintiffs"), business and residential tenants in the Lincoln Square area of the Borough of Manhattan in the City of New York, brought this action to enjoin the prosecution of the Lincoln Square Title I Urban Renewal Project (hereinafter referred to as the "Lincoln Square Project" or as the "Project") and to have certain actions of the Board of Estimate of the City of New York relating to the Project declared null and void.

The Lincoln Square Project envisages the reclamation and the redevelopment of a thirteen-block portion of the Lincoln Square area (hereinafter referred to as the "Project Area") and is divided into five component parts —the Collegiate Site, the Cultural Site, the Institutional Site, the Residential Site and the Co-operative Site. The Project is more fully described in the exhibits annexed to the answer of respondents (R. 82-102).**

Intervenor-respondent Webb & Knapp Lincoln Square Corporation (hereinafter referred to as "Webb & Knapp") is the redeveloper of the Project's Residential Site. As such redeveloper, Webb & Knapp will erect upon the Residential Site modern, fireproof multiple dwellings and related commercial facilities.

This action was commenced on December 2, 1957 by the service by plaintiffs upon respondents (hereinafter collectively referred to as the "City") of a summons, a complaint and an order to show cause. By the order to show cause, plaintiffs moved for a preliminary injunction restraining the City from acquiring the Project Area and for other relief.

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* Two of the original plaintiffs are not petitioners here.

** References are to pages of the record on appeal as printed for the Court of Appeals.

The City served an answer and moved to dismiss the complaint, for judgment on the pleadings and for summary judgment.

By orders consented to by all of the parties, intervenors-respondents Fordham University (hereinafter referred to as "Fordham"), the sponsor of the Project's Collegiate Site, Lincoln Center for the Performing Arts, Inc. (hereinafter referred to as "Lincoln Center"), the sponsor of the Project's Cultural Site, and Webb & Knapp were permitted to intervene in this action and to serve answers to the complaint.

Fordham served an answer and moved to dismiss the complaint and for summary judgment.

Lincoln Center served an answer and joined in the motions made by the City and by Fordham.

Plaintiffs then cross-moved for summary judgment.

Webb & Knapp served an answer, but its answer was not considered by Special Term on these motions.

After hearing thereon, Special Term entered an order which granted the motions of the City, Fordham and Lincoln Center to dismiss the complaint and for summary judgment and which denied plaintiffs' motion for a preliminary injunction and their cross-motion for summary judgment.

Plaintiffs then appealed to the Appellate Division from the order of Special Term. That appeal also brought up for review the judgment entered on that order.

The Appellate Division unanimously affirmed the order and judgment of Special Term and entered an order affirming that order and judgment.

Plaintiffs then appealed to the Court of Appeals from the order of the Appellate Division. That appeal also brought up for review the judgment entered on that order.

The Court of Appeals unanimously affirmed the judgment of the Appellate Division and entered an order affirming that judgment.

Plaintiffs then moved in the Court of Appeals for an order staying and enjoining the Lincoln Square Project pending the final disposition of this case by this Court. That motion was denied without opinion.

Petitioners then applied for an order from Mr. Justice Harlan staying and enjoining the Lincoln Square Project pending the final disposition of this case by this Court. That application is *sub judice* as this brief is written.

Petitioners then filed the present petition in this Court.

It is to be noted that only the redevelopment of the Collegiate Site by Fordham is alleged to be unlawful. Plaintiffs have in no way challenged any of the other four segments of the Project.

Argument

The briefs of the City and of the other intervenors-respondents adequately show that the decision of the Court of Appeals was correct and we believe that further argument on that point is unnecessary.

However, petitioners contend that, regardless of whether or not the decision of the Court of Appeals was correct, this Court should review that decision (a) because that decision involved substantial federal questions which this Court has not yet resolved (petition, pp. 13-20) and (b) because that decision conflicts with certain decisions of this Court (petition, pp. 21-23).

Accordingly, in this portion of our brief, we endeavor merely to meet those two contentions of petitioners. In Point I, we meet the first of petitioners' contentions. In Point II, we meet the second of petitioners' contentions.

I

There are no substantial federal questions here involved.

Petitioners assert that the decision of the Court of Appeals in the present case raises a number of substantial federal questions not heretofore resolved by this Court (petition, pp. 2-4, 13-20).

Petitioners base that assertion upon the ground that that decision improperly allows the sale of the Lincoln Square Project's Collegiate Site to Fordham, a religious institution, for less than the cost to the City of New York of the acquisition thereof. They allege (petition, pp. 14-15):

> "* * * (1) that the principles underlying the doctrine of 'separation between Church and State' prohibited the sale of part of that slum to a Roman Catholic institution at a negotiated price, approximately 3½ million dollars less than the price to be paid by the City (especially where two-thirds of the 3½ million dollar loss will be borne by the Federal Government), and (2) that as construed by the Court below, Title I of the 'Housing Act of 1949', 63 Stat. 413, as amended, 42 U.S.C. 1441, *et seq.* and section 72-k of the New York General Municipal Law are unconstitutional as being in violation of the First and Fourteenth Amendments, respectively."

In short, petitioners' challenge here is based upon the re-sale of a portion of a Title I project to a religious institution at a "writedown" from the cost of acquisition.

(a)

First, we submit that those federal questions are insubstantial because this Court has clearly indicated that the circumstances surrounding the re-use of a slum clearance area are irrelevant in determining the validity of the project.

Under Title I and similar statutes, land is condemned by a municipal agency to achieve the public purpose of slum clearance and then re-sold to redevelopers (see p. 11, *infra*).

In the present case and in prior cases, the courts of New York have held that a taking for slum clearance is in itself a taking for a public purpose, and that the nature of the re-use is immaterial.

Thus in *Kaskel* v. *Impellitteri*, 306 N. Y. 73 (1953), *cert. denied*, 347 U. S. 934, the Court of Appeals stated (306 N. Y. at 93):

> "Section 72-k of the General Municipal Law is drawn upon the basis, upheld in *Matter of Murray* v. *La Guardia*, that slum clearance is in itself a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital. The State Constitution does not require that slums shall be rehabilitated exclusively by reconstruction for low cost housing, which is a different public purpose that may or may not be superimposed on slum clearance (*Matter of Murray* v. *La Guardia*, *supra*). Consequently, except where an applicable statute requires, the slum area may be cleared, replanned, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary."

Since this Court has never condemned as a violation of the Fourteenth Amendment a taking upheld by a state court as a taking for public uses in conformity with its laws, *U. S. ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, 552, the character of the re-use should similarly be irrelevant in this Court.

Our position finds further support in the decisions of this Court in *Burt* v. *Pittsburgh*, 340 U. S. 802, and *Berman* v. *Parker*, 348 U. S. 26.

In the *Burt* case, this Court affirmed on the authority of the *Welch* case, *supra*, the judgment of a three-judge District Court which refused to look beyond the condemnation of a slum area to the character of the re-use.

In the *Berman* case, this Court, in affirming the dismissal by a three-judge District Court of an action seeking to enjoin a Washington, D. C. Title I project, refused to look to the circumstances of re-use as a ground for invalidating the project. This Court stated that the object, slum clearance, was within the power of Congress as the local legislative body for the District and that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine" (348 U. S. at 33).

It should be noted that petitioners themselves recognize that "review [by this Court] may be unavailable because of *Berman* v. *Parker* * * *" (petition, p. 20).

(b)

Second, even if the circumstances surrounding the re-use of a slum clearance area are relevant in determining the validity of the project, we submit that the aforementioned federal questions are insubstantial in the light of the views expressed by this Court in *Berman* v. *Parker*, *supra*.

In the *Berman* case, this Court, in upholding the constitutionality of the District of Columbia Redevelopment Act of 1945,* clearly indicated that a religious institution may participate in a Title I project. The Court said of the Title I project there challenged (pp. 34-35):

> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools,

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* 60 Stat. 790; D. C. Code, 1951, Title 5, §§ 5-701—5-719.

> *churches,* parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. * * * Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power" (emphasis supplied).

Since the Title I scheme in general, and the Title I project and the District of Columbia Redevelopment Act challenged in the *Berman* case in particular, inevitably involve a "writedown" re-sale to the participants therein (p. 11, *infra*), this Court's statements in *Berman* appear clearly to foreclose the contentions advanced by petitioners herein.

II

There is no conflict between the decision of the Court of Appeals in the present case and the decisions of this Court.

Petitioners assert that the decision of the Court of Appeals in the present case conflicts with the decisions of this Court in *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; and *Zorach* v. *Clauson*, 343 U. S. 306 (petition, pp. 21-23).

In those three cases, this Court ruled that cities and states may not subsidize religious institutions. In the *Everson* case, this Court, in upholding a New Jersey statute which authorizes local school districts to make rules and contracts for the transportation of children to and from parochial schools, stated (330 U. S. at 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can

> force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

In the *McCollum* case, this Court, in striking down a "released time" program of the Champaign, Illinois, public schools, reiterated the language of *Everson* quoted above. In *Zorach*, this Court upheld a New York City "released time" program because it "involves neither religious instruction in public school classrooms nor the expenditure of public funds" (343 U. S. at 308-309).

Thus, the decision of the Court of Appeals herein can conflict with the decisions of this Court in the *Everson*, *McCollum* and *Zorach* cases, *supra*, only if there is here involved a governmental subsidy to a religious institution.

Throughout this action, petitioners have alleged that Fordham is a religious institution and that the City of New York and the federal government are subsidizing Fordham (a) because the Title I scheme necessarily involves a subsidization of its participants and (b) because of the particular facts relative to the participation by Fordham in the Lincoln Square Project.

However, we think it is clear, as hereinafter shown, (a) that a redeveloper does not receive a subsidy by participating in a Title I project and (b) that Fordham does not receive a subsidy by participating in the Lincoln Square Project.

(a)

The course of a Title I project is in barest outline as follows: A local public agency (e.g., a city) acquires a slum area; such agency then either sells (or leases), or clears and then sells (or leases), the area to a redeveloper either at a negotiated price or after a public auction, subject to re-use restrictions, with the difference between the cost of acquisition (or of acquisition and clearance) and the sales price paid by the redeveloper borne by such agency and by the federal government; the redeveloper then redevelops the area in accordance with a redevelopment or renewal plan embodying such re-use restrictions.

If a subsidy lurks anywhere in the Title I scheme, it can only lurk in the differential between the cost of acquisition (or of acquisition and clearance) and the subsequent resale price to the redeveloper.*

However, in passing upon slum clearance projects, state courts besides those of New York State have unequivocally held that the differential between the cost of acquisition (or of acquisition and clearance) and the resale price does not constitute a subsidy.

In *State* v. *Land Clearance, etc.*, 364 Mo. 977, 270 S. W. 2d 44 (Sup. Ct. Mo. 1954), the court, in determining that the redevelopment project there involved did not provide a subsidy, stated (270 S. W. 2d at 53):

> "It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy. Both the statute and the undertakings of re-

* In their briefs to the courts below, plaintiffs alleged that a subsidy lurks in the Title I scheme solely because of this differential. Although petitioners do not state in their petition to this Court why they believe that the Title I scheme involves a subsidy, we assume that they still believe that this differential constitutes such subsidy.

> spondents pursuant thereto so clearly demonstrate that the purpose in acquiring the land is to rid it of its blighted and insanitary condition and to thereafter convey it to redevelopers for conversion to useful purposes in accordance with the redevelopment plan. The great weight of authority is that there is no private grant when land is cleared for the purposes herein contemplated and is thereafter sold at a loss, but for its then fair value."

The statute involved in *State* v. *Land Clearance* is substantially equivalent to Section 72-k of the General Municipal Law of the State of New York, the statute under which the Project Area was condemned and sold. If anything, the *Land Clearance* statute is less likely than Section 72-k to extract "fair value."

In *People* v. *City of Chicago*, 414 Ill. 600, 111 N.E. 2d 626 (Sup. Ct. Ill. 1953), the court, in upholding an Illinois slum clearance statute, stated (111 N.E. 2d at 636-637):

> "Plaintiff's assumption of a donation to Normandy Homes, Inc., the prospective developer here, is erroneous. Section 19 does permit the Commission to sell land in a project to a developer at 'use value.' This term is defined as 'the value at which the Commission determines such land should be made available in order that it may be developed or redeveloped for the purposes specified in the plan presented.' Sections 3(l) and 14 provide that the land for blighted vacant area redevelopment projects must be developed for predominantly residential uses. The 'use value' will thus be the value of the land, subject to restrictions placed upon it by the statute and the redevelopment plan. In this there is no donation of land to a private corporation, nor is there any loan of credit. The constitutional prohibition is not a bar to a municipality entering into a transaction where there is an exchange of consideration between the parties."

Similarly, in *Velishka* v. *City of Nashua*, 99 N.H. 161, 106 A. 2d 571 (Sup. Ct. N.H. 1954), the court, in upholding a New Hampshire slum clearance statute, stated (106 A. 2d at 575-6):

> "Section 5 of the act permits the housing authority to sell or lease the land in the project area 'at its use value' which may be less than the cost of acquisition, clearance and site improvements. The sale or lease to private enterprise is required to be made subject to conditions that will insure that the blighted or slum conditions do not return. * * * The sale or lease is not a gratuity since it is made at its use value as a means of assuring the redevelopment in accordance with the redevelopment plan. Cf. *Opinion of the Justices*, 95 N.H. 548, 65 A. 2d 700. There is no grant of public funds for private purposes in violation of the Constitution since the housing authority may sell or lease the land only at a use value and for uses which are consistent with the continuous use of the redevelopment in accordance with the original public purpose and plans."

See also, *Cremer* v. *Peoria Housing Authority*, 78 N. E. 2d 276, 284 (Sup. Ct. Ill. 1948); *Foeller* v. *Housing Authority of Portland*, 256 P. 2d 752, 767 (Sup. Ct. Ore. 1953) and *Gohld Realty Co.* v. *City of Hartford*, 104 A. 2d 365, 370 (Sup. Ct. Errors Conn. 1954).

In point of fact, the differential between the cost of acquisition (or of acquisition and clearance) and the sales price, far from being a subsidy, is merely an allowance to induce the redeveloper to undertake the obligations and to accept the restrictions imposed upon it under the redevelopment contract. Those obligations may include, as in the present case and in all other Title I projects in New York City, the relocation of residential tenants, the removal of commercial tenants and the demolition of existing buildings and structures, and always include the

construction of new improvements. The restrictions imposed require the redeveloper to use the land and the new improvements in accordance with the limitations set forth in the redevelopment or renewal plan.

As a result of the foregoing, what petitioners claim is a subsidy is rather a bargained-for equivalent which either arm's length negotiations or a public auction insures is not a subsidy.

(b)

In their arguments to the courts below, petitioners stated that, regardless of the propriety of the Title I scheme in general, Fordham, on the facts of the present case, receives a subsidy by its participation in the Lincoln Square Project and that the subsidy stems from the sponsorship contract between the City of New York and Fordham, from the condemnation of the Collegiate Site and from the restrictions imposed upon the redevelopment of the Collegiate Site.* Petitioners' brief in the Court of Appeals stated that "* * * [Fordham] is clearly benefited by the sponsorship contract * * *" (p. 30); that "[t]he use of the City's power of *eminent domain* * * * has conferred a real and substantial benefit to [Fordham] * * *" (p. 28); and that "[i]t is of course the reuse restriction itself which gave Fordham its principal benefit" (p. 31).

Clearly, Fordham does not on the facts of the present case receive a subsidy through the sponsorship contract. The only "advantage" which Fordham received therein was the assurance that the City of New York would sell the Collegiate Site to Fordham if it were the highest bidder (Exhibit B annexed to the affidavit of Robert Moses, R. 71). In no real sense was this a greater assurance than that granted to any prospective bidder at the public auction of that Site. Contrasted to this "ad-

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* Again, although petitioners are not clear on this point, we assume that this position is comprehended within the arguments set forth on pages 18-19 of the petition.

vantage" was the steep obligation imposed by the contract solely upon Fordham to bid at least $2,241,610 for the Collegiate Site.

Equally clearly, Fordham did not receive a subsidy by the condemnation of the Collegiate Site. The condemnation was an independent act of the City, legally unrelated to the Project. Certainly, the condemnation was not for Fordham. If anything, it was for the subsequent public auction and that auction was not held for Fordham's benefit.

Finally, Fordham does not receive a subsidy through the restrictions on the re-use of the Collegiate Site. Those restrictions require that that Site be used exclusively for educational purposes for a period of forty years (Exhibit B annexed to the affidavit of Robert Moses, R. 71). Because of those restrictions, only educational institutions could bid for that Site, but such a limitation upon the potential bidders for that Site hardly "subsidizes" any one educational institution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 23, 1958.

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No. 1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,
FORDHAM UNIVERSITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT FORDHAM UNIVERSITY IN OPPOSITION

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IN THE

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OCTOBER TERM, 1957

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, *et al.*,
FORDHAM UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT FORDHAM UNIVERSITY IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of the State of New York has not been officially reported, but is to be found at pages 35-39 of the Record on Appeal (hereafter "R.") in the court below. No opinion was written by the Appel-

late Division of the Supreme Court. The opinion of the Court of Appeals of the State of New York (App. B of Petition, pp. 35-39) will be officially reported at 4 N. Y. 2d 268.

Question For Review

Following the same procedure as in all its previous slum clearance projects, the City of New York acquired the Lincoln Square slum area by condemnation, and sold parcels of it at public auction to various "sponsors". Each of these had previously agreed (i) to bid a stated minimum at the auction and (ii) (if the successful bidder) at its own expense to demolish all buildings on its parcel, relocate all tenants, construct new buildings conforming with the City's specifications, and use the property in a specified manner designed to prevent the recurrence of slum conditions. One of these sponsors was Fordham University, a denominational institution.

The going-concern slum value which the City must pay on condemnation is established on a different basis from, and will of necessity in every instance be greater than, the limited reuse value on sale to any sponsor. In the case of Fordham University, the price which it paid at auction was conceded by the petitioners, and was found by all the courts below, to be higher than the reuse value established by several unchallenged appraisals.

The question sought to be presented is whether this procedure is unconstitutional, and more particularly, whether the difference between the condemnation value paid by the City and the fair reuse value paid by Fordham University is a "subsidy" to Fordham and therefore a constitutional bar preventing the University from participating, upon equal terms with others, in this slum clearance project.

All courts below unanimously found that the claim of "subsidy" to Fordham University is without foundation in fact. Upon the undisputed facts thus found, we submit that no substantial Federal question is presented, and that the petition for certiorari should be denied.

Statement

Petitioners are neither property owners nor taxpayers, but merely occupants of residential or business space in premises within the project area.

Nevertheless, they seek to defeat, in its entirety, a slum clearance and rehabilitation plan of the City of New York upon the *sole* ground that one of the several purchasers at public auction of property within the project area is a denominational institution and that its participation in the project involves an unconstitutional "subsidy" to religion in violation of the First and Fourteenth Amendments.

The project which plaintiffs thus seek to defeat is the Lincoln Square Urban Renewal Project, covering a 13-block slum area on the west side of Manhattan, New York City roughly north of West 60th Street, south of West 70th Street and west of Broadway. In determinations not here challenged, the duly constituted agencies of New York City found the Lincoln Square area to be substandard and unsanitary, and proceeded, pursuant to Article XVIII of the State Constitution and Section 72(k) of the New York General Municipal Law to devise a plan for elimination of the slum and rehabilitation of the area. The procedure followed was precisely the same as that which had been followed in every other slum clearance project in New York City, and has been repeatedly sustained by the courts (*Kaskel* v. *Impelleteri*, 306 N. Y. 73, cert. den. 347 U. S.

934; *Murray* v. *LaGuardia*, 291 N. Y. 320, cert. den. 321 U. S. 771; *Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. (2d) 293, aff'd 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029; *Boro Hall Corporation* v. *Impelleteri*, 128 N. Y. S. 2d 804, aff'd 283 App. Div. 889, motion for leave to appeal denied 307 N. Y. 672).

The Lincoln Square plan calls for inclusion of four basic areas:

1. A housing development;

2. A performing arts center;

3. An institutional area for which the sponsor is the American Red Cross;

4. A collegiate site of approximately 320,230 square feet to be redeveloped by an educational institution for educational use.

It is upon the fourth item that the petitioners center their attack; and it is upon the basis of that item alone that they seek to block the entire project.

The plan, like all other slum clearance projects in New York City, provided that a prospective purchaser, designated as a "sponsor" for each site in the area, should enter into an agreement with the City to bid a minimum price at public auction, and, if the successful bidder, to purchase the site, demolish the slums and reconstruct the area—not for whatever purpose the purchaser might elect—but strictly pursuant to and for the specific purpose set forth in the plan. The City in turn agreed to acquire each site by condemnation or otherwise, and to sell it to the sponsor at public auction, unless someone else made a higher bid to purchase the same site for the use permitted by the plan.

The advantage to the City of having sponsors is obvious. Before the City embarks on a widespread and costly plan of condemnation with a view to slum clearance, it desires some assurance that the slum will be cleared and that the property will not be left on its hands. It seeks to obtain, by way of guaranteed minimum bids, at least some idea of what the total cost will be (R. 61-2, 129). It is for this reason that every Title I project in New York City has been carried out with sponsorship bids of the same type as are involved here. Indeed, petitioners' brief in the Appellate Division went so far as to assert (pp. 23-24) that if the City in this or any other instance had set up a collegiate site without having "a visible purchaser" already committed as sponsor to take it, the City's action would have been "arbitrary, capricious and unreasonable".

The petitioners' complaint asserts that Mr. Robert Moses (Chairman of the Committee on Slum Clearance) announced that the solicitation of sponsorship bids "was widely advertised" (R. 15). Sponsorship bids were obtained for each of the four listed areas, including an offer from Fordham University to bid for the collegiate site at a minimum of $5 per square foot. Fordham's offer was thereafter increased, first to $6.75 and finally to $7 per square foot (R. 105).

The project plan was approved, pursuant to law, by the Federal Housing and Home Financing Agency, the City Planning Commission and the Board of Estimate. On February 28, 1958, the City acquired title to the project area through condemnation. On the same day a public auction was held, pursuant to Section 72(k) of the General Municipal Law, at which the sponsors successfully bid in their respective areas. Title was thereupon con-

veyed to them. Although the sponsorship agreement authorized a purchase money mortgage, Fordham paid $2,241,610 ($7 a square foot) in cash in full payment of the purchase price of the collegiate site.

Fordham University is a New York educational corporation administered by members of the Jesuit Order, although its faculty is not composed exclusively of members of that Order or persons of the Catholic faith (R. 139). Throughout its 115 year history, individuals of all races, colors and creeds have been, and will continue to be, included in its student body. During its entire existence no applicant has ever been denied an opportunity for education at Fordham because of race, creed, color or national origin (R. 136-9).

Indeed Section 501 of Article V of the sponsorship contract between the City and Fordham* provides:

> "The sponsor shall not discriminate against or segregate any person seeking accommodation in any structure in the Collegiate Site because of that person's race, color, religion, national origin or ancestry."

On the parcel acquired by Fordham, which constitutes approximately 15% of the total project area, Fordham proposes to locate its Schools of Education, Law, Business and Social Service.

The prices paid by all sponsors—were based upon appraisals approved by both federal and municipal authorities. In fact, and as found by all courts below, the $7 figure Fordham agreed to, and did, bid was based not upon the educational reuse to which the University

*Copy annexed to Fordham's answer to the complaint; omitted by stipulation in the printed record; copies submitted herewith.

will devote the property, but upon the much more valuable reuse for housing purposes. This $7 figure, as petitioners conceded in the Court of Appeals (their brief p. 10) and as that Court found, was actually in excess of the appraisal figures for the more valuable housing use. The record shows without contradiction that the appraisal figures for the housing use were $6.71 and $6.50 respectively (R. 129-130), while the appraisal figures for educational use was only $4.84 (R. 129).

Petitioner sued for a declaratory judgment and an injunction. At Special Term of the New York Supreme Court both sides moved for summary judgment, both sides asserting that no disputed issue of fact was presented. The Special Term, unanimously affirmed by all twelve judges of the two appellate courts, found that there was no substance to petitioners' claim and dismissed their complaint.

ARGUMENT

The thrust of petitioners' contention in the New York Supreme Court was that the transaction somehow resulted in "aid or maintenance" to Fordham University in violation of Article XI, section 4 of the New York State Constitution, and also in violation of the Fourteenth Amendment of the United States Constitution. Petitioners' secondary argument was that the condemnation of the slum was for a private purpose in violation of Article I, section 7 of the New York Constitution and the Fourteenth Amendment.

These contentions fell with the finding of the court of first instance, on the facts, that no aid or maintenance was conferred upon Fordham, and that, in fact, the condemnation was for a public purpose (R. 203, 207). In

the Appellate Division petitioners extended their same contentions by alleging the illegality of Title I.

The Appellate Division and Court of Appeals each unanimously affirmed the findings of the Supreme Court.

Thus, petitioners seek to invoke the aid of this Court on a record which establishes, as the New York courts have unanimously found, that there is no "aid" or "subsidy" to Fordham, and that the condemnation of the blighted area was for a public purpose.

And we have it of record that petitioners "believe that the record herein does not present a genuine issue of fact" (R. 165).

I.

No Substantial Federal Question is Presented.

The complete lack of merit in petitioners' case, and the total absence of any substantial Federal question, are demonstrated by the unanimous reasoning of the Court below (4 N. Y. 2d 268, 275-6):

> "Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. *The argument, however, proceeds on an assumption false in fact.* Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. *Ford-*

ham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. *There is in this record no dispute of the fact, found by both courts below*, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. *Therefore, there is no substance to the assertion, on which this whole suit depends*, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

"*Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding.*"

The somewhat garbled series of extracts from this opinion set forth at page 18 of the Petition significantly omit the portions above italicized.

Little more need be added. It may be observed, however, that throughout the nation the Courts have consistently held that there is no grant or subsidy to a private redeveloper when land is acquired by a city for slum clearance purposes and thereafter sold at a price which is less than the purchase or condemnation cost to the city, but is the fair value of the land for uses specified in the redevelopment plan. (*State* v. *Land Clearance for Redevelopment Authority of Kansas City*, 364 Mo. 974, 989, 270 S. W. 2d 44; *Velishka* v. *City of Nashua*, 99 N. H. 161, 106 A. 2d 571, 575-6; *People* v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626; *Gilbert* v. *City of Dayton*, 59 N. E. 2d 954, 959 [Ohio Ct. of App.]; *Furlong* v. *South Park Comm'ers*, 340 Ill. 363, 172 N. E. 757; *Foeller* v. *Housing Authority of Portland*, 198 Ore. 205, 256 P. 2d 752, 767).

It has likewise been held throughout the nation that the exercise by a municipality of its power of eminent domain and the use of public funds to acquire slum areas serves a public rather than a private purpose, even though there be a resale of the property to private enterprise. (*Burt* v. *City of Pittsburgh*, 340 U. S. 802 [opinion *per curiam*]; *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884, cert. den., 321 U. S. 771; *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. den. 347 U. S. 934; *In re Harlem Slum Clearance Project*, 114 N. Y. S. 2d 787, aff'd 281 App. Div. 1024; *Allydonn Realty Corp.* v. *Holyoke Housing Auth.*, 304 Mass. 288, 23 N. E. 2d 665; *In re Slum Clearance in City of Detroit*, 331 Mich. 714, 50 N. W. 2d 340; *Nashville Housing Auth.* v. *City of Nashville*, 192 Tenn. 103, 237 S. W. 2d 946; *Opinion of the Justices*, 254 Ala. 343, 48 So. 2d 757; *Robinette* v. *Chicago Land Clearance Commission*, 115 F. Supp. 669 [N. D. Ill.], motion for leave to file petition for writ of mandamus denied, sub. nom. *Robinette* v. *Campbell*, 342 U. S. 940).

Congress expressly stated the purpose of Title I to be the elimination of substandard housing through the clearance of slums and blighted areas and added that "appropriate local bodies" shall be assisted to undertake slum clearance and community redevelopment programs (63 Stat. 413; 42 U. S. C., sec. 1441). The federal funds are paid not to any private redeveloper, but only "to local public agencies" (63 Stat. 416, as am.; 42 U. S. C., sec. 1453). As Commissioner Follin of the Urban Renewal Administration—Housing and Home Financing Agency, in the Sundwall Memorial Lecture at the University of Michigan on May 3, 1955 (printed as Urban Renewal Administration Bulletin No. 2) stated (p. 18):

> "Federal assistance for urban renewal projects may be given only to local public agencies duly authorized by State and local law to carry out the various activities involved in urban renewal projects."

The federal grant—and the City's own funds—will be used for a single purpose, viz.,—to enable the City to condemn a slum area with a view to its elimination. No portion of the federal funds ultimately received by the City will be given to the private redevelopers, nor will those funds in anywise be applied to offset the costs of relocation, demolition and reconstruction incurred by the private redevelopers under their agreements.

In the case at bar, the procedure followed was precisely the same as that which the City of New York has uniformly followed in all of its slum clearance projects, and which has been repeatedly sustained by the courts.

In two of those cases, institutions of higher learning were among the sponsors who bid for and secured parcels —New York University in the Washington Square Project

(*Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. 2d 293, aff'd 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029) and Long Island University in the Fort Greene Project (*Boro Hall Corp.* v. *Impellitteri*, 128 N. Y. S. 2d 804, aff'd 283 App. Div. 889, motion for leave to appeal denied 307 N. Y. 672).

All courts below have found as fact—and it is incontrovertible—that the City bought one thing, and sold something entirely different, to each of the purchasers here, including Fordham.

The City *acquired*, by lawful condemnation, property as presently in use, encumbered by substandard slum buildings, and will pay for them as it must, upon that basis.*

What the City *sold* to Fordham (and the other successful bidders) was a tract of land on which Fordham (and the others) will be required, *at their own expense* (which of course adds to the cost of the land) to:

(1) relocate all existing tenants;

(2) demolish all existing structures; and

(3) rebuild the site, in Fordham's case, for educational purposes, according to the Urban Renewal Plan.

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* The complaint alleges that the collegiate site will cost the City, on condemnation, more than $16 per square foot (R. 15). This allegation, together with petitioners' assumption throughout the Petition (eg. pp. 3, 4, 14, 16) that there is a $3,500,000 difference between the cost of acquisition and the dollar amount paid directly to the City by Fordham, is, of course, conjectural since the acquisition cost cannot be determined until the granting of awards in condemnation. Accordingly, since the City bought one thing and Fordham, for good and valuable considerations, bought another, petitioners do not make out a constitutional question by their misleading attempt to compare the price which each paid for that which each purchased.

Thus, the consideration to the City was not merely the purchase price in dollars but in addition the substantial (and costly) obligation of each sponsor to carry out the public purpose for which the property was condemned—slum clearance and rehabilitation.

Both in the Court of Appeals and here petitioners conceded (Brief below, pp. 32-3; Petition, p. 3)

> "The highest price obtained at public auction of the collegiate site may have been the highest marketable price for collegiate purposes."

They argue nevertheless that the restriction to educational purposes in some way stifled competitive bidding.

Petitioners, however, have also asserted (R. 34-35):

> "If the collegiate sponsor was Columbia University, New York University or some other college not affiliated with a particular religious group, objections to the project on the grounds of subsidy would be untenable."

Petitioners do not explain—nor did they attempt to explain to the courts below—precisely how a restriction of part of the project area to educational use stifled competitive bidding by reason of Fordham's sponsorship, but would not have stifled competition had the sponsor been Columbia or New York University.

It is indisputable that modern urban renewal authorities recommend incorporation of an educational area into urban renewal development programs (see authorities collated in affidavit of Mr. Robert Moses, R. 50-60). This Court too has stated, in upholding the District of Columbia Redevelopment Act of 1945, that "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only

new homes but also *schools, churches,* parks, streets and shopping centers." (*Berman* v. *Parker,* 348 U. S. 26, 34-35;* emphasis ours).

The Lincoln Square Plan did not of course require that the redeveloper of the site should be Fordham University or any other denominational institution. Petitioners themselves point out that the solicitation of sponsorship bids "was widely advertised" (R. 15), and that other schools and universities had been contacted, but without success (R. 153). There is no basis in the record for the repeated assertion in the petition that the educational portion of the project was adopted solely for Fordham's benefit, and indeed even petitioners' complaint contained no such allegation.

In sum, petitioners here simply challenge the contract between Fordham and the City. We submit that the contract is based upon a fair exchange of considerations between the parties. Fordham bid for the property as any other organization or person could have done. Fordham received neither more nor less than any other bidder would have received. There is, and can be, no proof—of record or otherwise—that Fordham has received a gift or subsidy. The First Amendment neither requires nor permits Fordham University to participate in any such contract upon terms more onerous to it than would be required of others.

The full impact of petitioners' claim on this score is clearly exposed by this language in the petition (p. 17):

> "* * * we think this Court will hold that a religious institution may not participate in an urban

*On page 20 of the Petition petitioners seem to suggest that this Court overrule *Berman* v. *Parker*.

> renewal redevelopment project unless it pays the full acquisition cost of that portion of the project it obtains".

This amounts to saying that it is inherently unconstitutional for any denominational institution to participate in a Title I project upon any practicable terms; and that such institution could not participate upon the same terms as all others. In the case at bar petitioners say in substance that Fordham could not constitutionally acquire title to the educational area at public auction even if it were the highest bidder, unless its bid at least equalled $16 per square foot—the assumed "full acquisition cost" of the property. Petitioners have contended that Columbia University or New York University, for example, need bid only the fair reuse value of the land, should they choose to participate in a Title I project, but Fordham University must bid the cost of acquisition of the land by the City. Thus, assuming that Fordham were to bid $15 per square foot and a non-denominational bidder such as Columbia University were to offer $7, the property, under petitioners' construction of the First and Fourteenth Amendments, would have to be knocked down to Columbia.

At the argument in the Court of Appeals, petitioners' counsel made their position perfectly clear. Judge Fuld there inquired whether petitioners' contention did not amount in effect to placing all denominational institutions in a position inferior to all others. Petitioners' counsel unhesitatingly answered in the affirmative and added that in his view this was what the Constitution requires.

That this asserted position of inferiority would deprive Fordham of its constitutional rights seems clear. While the First and Fourteenth Amendments forbid any legislative "establishment" of religion, they equally forbid

any law "prohibiting the free exercise thereof". This means, as this Court held in *Everson* v. *Board of Education*, 330 U. S. 1, 18:

> "State power is no more to be used so as to handicap religions than it is to favor them."

And as declared in *Zorach* v. *Clauson*, 343 U. S. 306, 314:

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

What petitioners here seek to impose is a theory of government hostility to religion which has no basis in our Constitution and the implications of which would become more and more far-reaching as slum clearance projects multiply and as town and city planning embraces ever widening areas. Upon petitioners' theory it would be practically impossible for any institution, whether educational or otherwise, having denominational affiliations, to find entrance into a planned community (*cf. Berman* v. *Parker*, 348 U. S. 26, 34-5).

The Court of Appeals found (App. B. p. 39) that

> "since this sale is an exchange of considerations and not a gift or subsidy no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding".

Try as they may, these petitioners, on the undisputed facts as found, cannot torture this decision into raising any substantial federal constitutional question.

II.

Petitioners have no Standing to Maintain this Application.

In the courts below the parties-plaintiff included 64th St. Residence, Inc. and 89 Amsterdam Avenue Corporation, owners of property in the Lincoln Square area who brought the action as taxpayers chalienging Fordham's participation in the project, and also the present petitioners. These two taxpayers have dropped out of the action and are not petitioners in this Court.

The remaining parties, petitioners herein, are merely tenants in the area, whose landiords were never plaintiffs. We submit that these petitioners have not suffered and will not suffer damages recognizable in law, and therefore have no standing to maintain this application for a writ of certiorari.

Petitioners by their application challenge the constitutionality of federal legislation (Title I of the National Housing Act) and seek to enjoin public officials from carrying it out. An injury which would justify this type of action is one arising out of invasion of "a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded by the statute which confers a privilege" (*Tennessee Power Co.* v. *T.V.A.*, 306 U. S. 118, 137-8). On page 5 of petitioners' affidavit to support their application before Mr. Justice Harlan for an injunction and stay, it is admitted that any right of these tenants "would not ordinarily be the basis for the recovery of money damages".

Accordingly, we submit that the present petitioners do not have the standing of a taxpayer, much less that of a property owner, to challenge a federal statute or

to enjoin public officials from complying therewith. (See *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-8; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480-1; *Elliott* v. *White*, 23 F. 2d 997, 998; *Allied-City Wide Co., Inc.* v. *Cole*, 230 F. 2d 827).*

Thus, the present application should be denied not only because petitioners have failed to establish that a substantial federal question is presented but also because petitioners have no standing to make the application.

---

*On the discussion as to a stay or injunction before Mr. Justice Harlan, petitioners' counsel referred to *Parker* v. *Fleming* (329 U. S. 531) in answer to these authorities. That decision is not pertinent. It involved a controversy between a landlord and tenants under the Rent Regulations of the Emergency Price Control Act, designed for the protection of tenants. This Court held that under the provisions of that Act the tenants were entitled to review the Administrator's dismissal of their protest.

Conclusion

The decision below is clearly correct. There is no conflict of opinion. Petitioners have no standing to maintain the action. The case offered upon this record presents no substantial Federal question. The record presents mainly an ordinary contractual transaction between Fordham and the City based upon what the court below found to be "an exchange of considerations and not a gift or subsidy" (App. B. p. 39).

The petition for a writ of certiorari should be denied.

Dated May 27, 1958.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1014

ROSE K. HARRIS, EUGENE R. SHERRICK, and RENEE BOUCHET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMROW and PHILIP DRIEMAN, as co-partners doing business in the name and style of DAMROW & DRIEMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, & ORS., &c.,

Respondents,

FORDHAM UNIVERSITY, & ORS.,

Intervenors-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

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v.

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Respondents,

FORDHAM UNIVERSITY, & ORS.,

Intervenors-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

Opinion Below

The opinion of the New York Court of Appeals printed in Appendix "B" to the petition (pp. 35-39) is the unrevised opinion, designated by the Court as "not for publication." The official, revised opinion is printed as Appendix A hereto.

Question Presented

The only federal constitutional question open on this record is a narrow one involving only one aspect of the Lincoln Square Urban Renewal Project, adopted by the City of New York: whether the "establishment of religion" clause of the First Amendment, as read into the Fourteenth, was transgressed by the City's auction sale to Fordham University, a sectarian institution, of a site restricted for educational reuse as part of a larger slum clearance area, for a consideration consisting of

1. a cash payment less than the estimated cost of condemnation but more than the appraised reuse value, and

2. Fordham's obligation to clear and redevelop at its own expense.

On this record, no federal constitutional question is open as to the validity of the condemnation, effected for the public purpose of slum clearance and severable from the particular resale attacked. *A fortiori*, no such question is open as to the validity of resale of other portions of the area to other redevelopers having no religious affiliations, including this respondent, Lincoln Center for the Performing Arts, Inc.

On this record, no question as to the validity of Title I of the Housing Act of 1949 as amended, 63 Stat. 413 *et. seq.*, 68 Stat. 622, 42 U.S.C. §§ 1441, 1450, *et seq.*, can properly come before this Court. *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-9. See below, pp. 11-12.

Statement

The Lincoln Square Urban Renewal Project involves the clearance and redevelopment, for various types of reuse, of thirteen city blocks (Ex. A to Moses Affidavit, not printed, R.* 71). This area was duly found by the City Planning Commission to be a substandard and insanitary area (R. 92): that finding has never been challenged.

In accordance with its established procedure the City, before proceeding with the project, obtained commitments from sponsors to make minimum bids for specified sites within the area and to carry out the public purposes of slum clearance and redevelopment (R. 178, 61-4). The City Board of Estimate, on findings and consent of the City Planning Commission, and its own finding that acquisition was in the interest of the City's health and welfare and effectuation of the statutory purpose of rehabilitation of a substandard area, resolved upon condemnation of a number of separate sites comprising the area (R. 92-99, 78-79). The City then condemned the entire area: the condemnation, except on the basis of one resale, has not been challenged here.

Thereafter, pursuant to separate Resolution of the Board of Estimate (R. 101), separate parcels within the area were offered for sale at public auction. Separate sites, subject to specified reuse restrictions, were sold at public auction to the American Red Cross, Webb & Knapp Lincoln Square Housing Corporation, and this respondent, Lincoln Center for the Performing

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* Record references are to the printed record in the New York Court of Appeals.

Arts, Inc. (herein called "the Center"). No question has been raised as to the eligibility of any of these purchasers. Another and separate site was sold at public auction to Fordham University, a sectarian educational institution, for educational reuse. The entire issue in this case is whether Fordham, because of its sectarian nature, was eligible to purchase the educational site at public auction.

The complaint alleged violations of the Fourteenth Amendment and the State Constitution by acts of the City and its officials (R. 17, 19). It did not allege the unconstitutionality of any statute (see R. 10-22).

The complaint alleged in substance that the City officials, proceeding under § 72-k of the New York General Municipal Law (authorizing condemnation of substandard or slum areas for clearance and rehabilitation), were authorized to apply for feder. aid under Title I of the Federal Housing Act of 1949, as amended, and were processing a plan for redevelopment of the Lincoln Square area; that by a sponsorship contract with the City, Fordham University, a Catholic school, had contracted to bid a minimum price at public auction for the area site restricted to educational purposes; that the City regarded such sponsorship contracts as essential to carrying out such a project; that Fordham was the only possible bidder for the "collegiate" site, which would be acquired by the City at a price substantially greater than Fordham would pay if it acquired the land at its minimum bid; that by virtue of the difference there was a direct subsidy to Fordham, and as a result of the City's exercise of its condemnation power an indirect subsidy to Fordham; and that the alleged acts of the City and its officials and the "condemnation as

approved and authorized by the Board of Estimate as aforesaid" were "illegal, void and a taking of public property for a non-public use in violation of the Fourteenth Amendment,"* and would result in depriving petitioners of their places of residence (R. 10-22). The complaint sought a declaration of invalidity and a broad injunction prohibiting, among other things, condemnation of the whole project area (not merely the collegiate site) and further processing of the City's plans (R. 21-22).

While the complaint referred to Title I of the Housing Act of 1949 [42 U.S.C. § 1450 *et seq.*] as the source of federal financial assistance (R. 11-12, 19), it contained no allegation that the statute was unconstitutional or that the federal officials administering it had performed illegal or unconstitutional acts under it (see R. 10-22). No federal official was made a party.

The complaint did not allege that the collegiate reuse restrictions were adopted for Fordham's benefit; the allegation is that after the Chairman of the City's Committee on Slum Clearance had solicited bids, he "thereafter accepted a sponsorship bid submitted by Fordham University to purchase the collegiate site * * * and restricted said site in the Project plan for redevelopment for educational purposes * * * " (Paragraphs Ninth, Tenth, R. 14, 19).

Although there is a general conclusory allegation that condemnation of the project area will be a taking

* The complaint mentions only the Fourteenth Amendment, but petitioners' arguments have been based on the First Amendment as made applicable to the states by the Fourteenth.

of private property for a non-public purpose, the only supporting facts alleged are those involving Fordham's participation (see R. 10-22). Nor has any other ground of invalidity been urged throughout the proceedings. Petitioners' objections to the project, according to the affidavit in support of their motions, "are solely related to Fordham University's participation as a redeveloper and the corresponding aid and financial subsidy which will be given to a sectarian institution by means of Fordham's participation" (R. 31).

Although the original defendants were only the City and its officials, certain of the proposed redevelopers, including the Center, intervened as defendants (R. 143, 137, 2). The Center is a non-profit organization incorporated for charitable and educational purposes, including promotion of the musical and performing arts. Under its sponsorship contract with the City it was obligated to make a minimum bid at public auction for a site within the Lincoln Square area, and, if the purchaser, to relocate tenants, clear the site, and construct a cultural center, including a new Opera House for the Metropolitan Opera Association and a concert hall for the New York Philharmonic-Symphony Society (R. 143-4).

Petitioners moved for a temporary injunction (R. 23). Defendants, joined by intervenors, moved for summary judgment (R. 121, 135, 144). Petitioners cross-moved for summary judgment (R. 145). Petitioners' motions, including the motion for a temporary injunction, were denied; respondents' motions were granted and the complaint was dismissed (R. 8, 9).

The judgment of dismissal was unanimously affirmed by the Appellate Division (R. 217) and the New

York Court of Appeals (Appendix A hereto, pp. A-1—A-4, *infra*). Prior to the latter affirmance, the City condemned the entire Lincoln Square area and resold portions at public auction. The Center is therefore now the owner of a site within the area which it is obligated to redevelop.

The facts established by Fordham and the City in support of the motion for summary judgment are sufficiently stated in their briefs. They showed, among other things, that the minimum price which Fordham agreed to bid exceeded the value set in any of three separate appraisals of the reuse value of the land, two of which were based on a use (housing) more valuable than the collegiate use (R. 129-131). Both Special Term (R. 202-3), unanimously affirmed without opinion by the Appellate Division (R. 212-4), and the Court of Appeals found that there was no subsidy, gift or grant to Fordham. The Court of Appeals viewed the whole contention of constitutional invalidity as founded on the "assumption, false in fact" that there had been any such subsidy (App. A hereto, pp. A-3—A-4).

The record does not support petitioners' repeated suggestions (see Petition, pp. 3, 6, 19) that the reuse restrictions upon land in the collegiate area were adopted in order to benefit Fordham. While charges to this effect are contained in petitioners' affidavits, they are based only upon inference not justified by the chronology relied on (see R. 149-153, 155-7; cf. P. 127).

Petitioners treat the sale to Fordham as though it were made at a private sale and at a negotiated price. The facts are that (1) the price specified in Fordham's

contract was only a minimum bid, which, however, was in an amount greater than any of three different appraisals (R. 129-31, Ex. B to Moses Affidavit, R. 71—not printed), and that (2) the sale was made at public auction for which bids were solicited and at which non-sectarian educational redevelopers could have bid (R. 62-3, 166-171). Moreover, by the contract Fordham was obligated at its own expense to clear and redevelop the land according to the City's requirements (R. 64).

The Resolution of the City Board of Estimate authorizing the condemnation of the seven separate sites within the Lincoln Square area is included in the Record (R. 92-99). It recites the necessary findings and consents called for by § 72-k of the New York General Municipal Law; it does not mention either "the Plan" or any particular sponsors as potential purchasers (R. 92-99). There is nothing in it to suggest that the condemnation was in any way dependent on any particular sponsors, on resale of any of the sites, or conditioned in any way. The Resolution recites that the Board has found that the acquisition "is in the interest of the City and the health and welfare of its residents and effectuate the purposes of Subdivision 2 of Section 72-k of the General Municipal Law, * * * " (R. 92).

Petitioners' affidavits furnish no basis for their contention that condemnation is inseparable from Fordham's participation (see R. 24-43; 147-165).

ARGUMENT

I

On the Facts There is no Subsidy to Fordham and Therefore no Substantial Federal Constitutional Question

The opinions of the New York Court of Appeals and the New York Supreme Court clearly show the correctness of their conclusions: that on the facts of this case there was no law respecting the establishment of, and no public financial assistance to, religion.

The Court of Appeals pointed out that petitioners' entire argument was based on an "assumption false in fact" (App. A hereto, p. A-3). From the undisputed evidentiary facts (both sides having moved for summary judgment), the Court found the ultimate fact that there was no gift, grant or subsidy of public funds to Fordham,* but an exchange of considerations pursuant to sale after an auction open to any other bidders able to meet the upset price established by appraisal, and able to clear and redevelop in accordance with the collegiate reuse restrictions. That decision, based on the particular fact situation involved, was clearly correct, is not in conflict with decisions of this Court, and does not merit review by this Court. There is thus no substantial federal constitutional question.

There is in this case no element of coerced education in religious faith, no alleged loss of the personal right

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* Other state courts have reached similar conclusions on similar facts. See *Vedishka* v. *City of Nashua*, 99 N.H. 161, 168, 106 A. 2d 571, 575-6; *People* v. *City of Chicago*, 414 Ill. 600, 617-8, 111 N.E. 2d 626, 636-7; cf. *Redevelopment Agency of San Francisco* v. *Hayes*, 122 Cal. App. 2d 777, 807-8, 266 P. 2d 105, 125, cert. den. 348 U. S. 897.

to freedom of conscience. The religious question was interjected solely by reason of Fordham's purchase at public auction of land condemned by the City, subject to use restrictions adopted as part of the City's slum clearance program, and at a price greater than the appraised value of the land as restricted. It is therefore irrelevant that the City's estimated cost for the land was greater than the price paid by Fordham; the City's cost was for the land and buildings without the restrictions placed thereon for the public purpose of slum clearance, and without the obligation to clear and rebuild.

The difference between the value of the blighted land as condemned, and the reuse value, is not a subsidy to any purchaser at the auction. It is simply the cost of removing slums in the public interest. On the admitted facts, the finding of absence of gift, grant or subsidy is plainly justified.

The reuse restrictions requiring use of the land for educational purposes were clearly proper. Cf. *Berman* v. *Parker*, 348 U. S. 26. Nor is there any basis for suggesting that such restrictions limited use to religious educational institutions; there were no such restrictions as to foreclose availability to a non-sectarian institution (R. 63-64, 68, 127).

Petitioners also seek to spell out a subsidy to Fordham, despite the facts of the case, by inference from what they erroneously regard as the Congressional purpose in enacting Title I of the federal Housing Act. They argue (see Petition, p. 13) from the preamble and legislative history that the Congressional purpose was "subsidizing" private redevelopers, rather than assist-

ing municipalities to attain slum clearance and housing objectives. In this they wholly misread the Act. The federal funds go solely to the "local public agencies". 68 Stat. 622, 42 U.S.C. § 1450. It is unambiguously clear from the statute itself that the Congressional purpose was to further housing and slum clearance; that the recipients of any "subsidies" were the municipalities, not the private redevelopers; and that private enterprise was utilized merely as a means of effectuating the Congressional and municipal purposes.

On the facts, the situation falls within that well-established area of the law: that in municipal slum clearance and redevelopment programs, any merely incidental private benefit is immaterial where the public purpose of slum clearance is served. *Burt* v. *Pittsburgh*, 340 U. S. 802; *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659, *cert. den.* 347 U. S. 934; *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884, *cert. den.* 321 U. S. 771; *Berman* v. *Parker*, 348 U. S. 26. Nor is it objectionable if the indirect recipient of an incidental benefit is religious in character. Cf. *Everson* v. *Board of Education*, 330 U. S. 1, 7.

The petition (pp. 13-14, 16), arguing the existence of a novel question, purportedly questions the constitutionality of Title I of the federal Housing Act of 1949, 63 Stat. 413, *et seq.*, as amended 68 Stat. 622, 42 U.S.C. §§ 1441, 1450 *et seq.* No question as to that statute is here open, for two reasons:

1. The federal statute, if involved in this case at all, involves only the expenditure of federal funds. But no individual, even assuming him to be a federal taxpayer, has standing to raise the question of constitu-

tionality of such expenditures. *Massachusetts* v. *Mellon, Frothingham* v. *Mellon,* 262 U. S. 447, 486-9.

2. In any event, as set forth above, no question as to the federal statute was properly raised below. No constitutional invalidity of the statute was alleged in the complaint or in petitioners' motion papers; no federal officials were made parties to the action; and no invalidity of the acts of such officials was urged. The opinions below (R. 200-207; App. A hereto, pp. A-1—A-4) do not establish that the New York courts were passing upon the constitutional validity of the federal statute. This Court lacks jurisdiction of a constitutional question not presented in the record and not necessarily passed on by the State court. See *Lynch* v. *New York,* 293 U. S. 52, 54; *Weber* v. *Opera on Tour,* 314 U. S. 615; cf. *Ellis* v. *Dixon,* 349 U. S. 458; *Rector, etc.* v. *Melish,* 301 N. Y. 679, 95 N. E. 2d 43, *cert. den.* 340 U. S. 936.

II

Since There is no Constitutional Question as to Condemnation of the Area, or as to Resale of a Portion to the Center, There is no Basis for Review of Either of These Severable Matters

Petitioners attempt to enmesh condemnation of the substandard area with subsequent resale of a part of it to Fordham. On the facts and under applicable state law, condemnation and resale are separate and distinct. Petitioners advance no other ground for

attack on the condemnation. (While petitioners assert that the condemnation was not for a public use, the only basis for that assertion is conceded to be Fordham's participation (R. 31)). Since even an invalid resale would not suffice to invalidate the prior condemnation, there is no federal constitutional question as to condemnation. *A fortiori,* there is no constitutional question as to resale, after condemnation, to organizations such as the Center which have no religious character.

It is well settled that slum clearance is a valid public purpose justifying condemnation. *Burt* v. *Pittsburgh,* 340 U. S. 802; *Berman* v. *Parker,* 348 U. S. 26. The constitutionality of § 72-k of the New York General Municipal Law, under which the condemnation here took place, is also settled. *Kaskel* v. *Impellitteri,* 306 N. Y. 73, *cert. den.* 347 U. S. 934. Explicit in the decision of the Court of Appeals below is the view that the City's purpose in this case was "its valid municipal purpose of eliminating a slum" (p. A-4, *infra*). The recitals in the Resolution of the Board of Estimate authorizing condemnation, as well as the New York statute, set forth this public purpose (R. 92; see Appendix to Petition, pp. 33-4).

Petitioners imply that condemnation was for the purpose of resale to Fordham. The record repels any such interpretation. This is merely a variation of the familiar argument, repeatedly demolished in the slum clearance cases,* that because there is a resale to pri-

* See, e.g. *Matter of Murray* v. *La Guardia,* 291 N. Y. 320, 329-330, 52 N. E. 2d 884, 888, *cert. den.* 321 U. S. 771; *Redevelopment Agency of San Francisco* v. *Hayes,* 122 Cal. App. 2d 777, 801, 266 P 2d 105, 120-1, *cert. den.* 348 U. S. 897; *People* v. *City of Chicago,* 414 Ill. 600, 611, 111 N. E. 2d 626, 633; *Velishka* v. *City of Nashua,* 99 N. H. 161, 166, 106 A 2d 571, 574.

vate parties the *purpose* is a private purpose, or one to benefit the private purchasers. This argument was decisively laid to rest by this Court in *Berman* v. *Parker, supra*:

> "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established * * *" (p. 33).

Resale to private parties does not make the use or purpose private; no more does resale of a part of the Lincoln Square area to Fordham affect the public purpose of this condemnation. On the record there is no basis whatsoever for saying that the purpose of the Board of Estimate in condemning the Lincoln Square area was anything other than that declared: clearance and redevelopment of a substandard area.

And as this Court pointed out in *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 607, and quoted in *U. S. ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 552: "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws." See also the opinion of the District Court in *Burt* v. *Pittsburgh* (unreported but included in the Supreme Court record in that case, p. 27, 340 U. S. 802).

The New York statute (compliance with which is recognized by the decision below) makes plain the independence of condemnation and resale.

Section 72-k of the New York General Municipal Law authorizes condemnation for the statutory purpose of clearance and redevelopment of substandard areas whether or not resale is contemplated. Subdivision 1 authorizes condemnation for the statutory purpose without any mention of resale. Subdivision 2 provides that in addition to other methods of disposition, the governing body "may" resell (see Appendix to Petition, pp. 33-4). Moreover, where resale is contemplated, the only requirement is that the City act on certain findings and consents, and insert provisions in the deeds insuring fulfillment of the slum clearance objectives; there is no requirement of any complete "plan" for the whole area, so that if one resale is invalid all resales must fall.

Condemnation and resale were here likewise separately dealt with in the resolutions of the Board of Estimate. The Resolution authorizing condemnation deals with several distinct parcels, and is itself separate from the Resolution authorizing resale. Both those Resolutions are also separate from the several Resolutions authorizing the sponsorship contracts (R. 39-41, 92-99, 101, 78-79).

In attempting to argue that the resale to Fordham was an inseparable element of the condemnation, petitioners lean heavily on Fordham's position in the Urban Renewal Plan (see e.g. R. 12-13, 16-17, 31-2; Petition, pp. 3-9). But the existence of an approved plan was not a prerequisite to condemnation. The only requirement of a "plan" is contained in Title I of the federal Housing Act of 1949, as a condition to federal financial assistance to the municipality. But § 72-k of the New York General Municipal Law does not make federal assistance a condition precedent or subsequent to condemnation; it merely provides that the

Board of Estimate "may" seek federal assistance. Condemnation is valid in the absence of any Urban Renewal Plan.

In insisting that the whole project must fall if the resale to Fordham was invalid, petitioners are asking this Court to substitute its judgment for that of the body to which the New York legislature entrusted the task. The Board of Estimate found condemnation of the Lincoln Square area to be in the interest of the City and its health and welfare (R. 92). And this Court has determined that:

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman* v. *Parker*, 348 U. S. at 35-6.

See also *Starr, et al.* v. *Nashville Housing Authority*, 145 F. Supp. 498, aff'd 354 U. S. 916.

Petitioners' attack on the City's contract with Fordham and on the validity of the resale to Fordham afford no basis for constitutional attack on the condemnation. No other basis exists in the record.

Since validity of the condemnation cannot be questioned, and since there is no question as to the eligibility of the Center as a purchaser at resale by public auction, there is no ground for interference with the Center's utilization of its land or its redevelopment thereof in accordance with its contract with the City and the restrictions in its deed. Even if the resale to Fordham were to be regarded by this Court as ques-

tionable, petitioners' sole grievance would justify review of no more than that particular resale.

Moreover, since petitioners are not within the Center's area (see Petition p. 5, footnote), they are not affected by the Center's ownership and lack standing to raise questions as to its purchase.

Accordingly, the record does not justify review of the condemnation or of the resale to the Center, both of which matters are severable from the resale to Fordham.

CONCLUSION

The questions raised by the petition are without merit. The petition lacks substantial grounds and should be denied. In any event, there is no basis for review either of the condemnation or of the resale to this respondent.

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May 28, 1958

APPENDIX A

(Opinion of Court of Appeals, State of New York)

64th St. Residences, Inc., et al., Appellants, *v.* City of New York et al., Respondents, and Fordham University et al., Intervenors-Respondents.

Decided May 1, 1958.

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 20, 1958, which unanimously affirmed a judgment of the Supreme Court, entered in New York County upon an order of the court at Special Term (Owen McGivern, J), (1) granting motions for summary judgment dismissing the complaint, and (2) denying a motion by plaintiffs for summary judgment.

[Appearances]

Desmond, J. Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of 13 city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of Article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (U. S. Code, tit. 12, § 1701 *et seq.*), the city's Board of Estimate presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts,

Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (U. S. Code, tit. 42, § 1450 *et seq.*), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at

which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, par. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the

assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion but representing the whole court's views on that question; and see *Bleecker Luncheonette* v. *Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term 1957

No. 1014

Rose K. Harris, Evelyne R. Sherrick, and Renee Bouret, suing on behalf of themselves and all others similarly situated, and United Ball Bearing Co., Inc., and Seymour Dennison and Philip Denman, as co-partners doing business in the name and style of Dennison & Denman, suing on behalf of themselves and all others similarly situated, *Petitioners*,

v.

City of New York & Ors., *Respondents*,

Fordham University & Ors., *Intervenor-Respondents*.

PETITIONERS' REPLY BRIEF

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IN THE

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October Term 1957

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated, *Petitioners*,

v.

CITY OF NEW YORK, & ORS., & C., *Respondents*,

FORDHAM UNIVERSITY, & ORS., *Intervenors-Respondents*.

PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

This brief is submitted by petitioners in reply to the briefs in opposition to the petition for certiorari. In view of the limited time available to petitioners' counsel for reply, this brief will be limited to some of the arguments set forth in the briefs in opposition submitted by the City of New York and Fordham University and to an anticipated argument to be submitted on behalf of respondent-intervenor, Lincoln Center for the Performing Arts, Inc. We shall make it clear (1) that petitioners have not conceded as the respondent, City of New York, suggests, (a) that "there is no prohibition excluding Fordham *per se* from the suggested plan or procedure assuming Fordham to be the successful bidder at the auction" (*City's Br.*, 5-6),

or (b) "that a religious institut
tionally barred from participation would not be constitu-
'full acquisition cost * * * of thing in the plan if it paid
obtains'" (*City's Br.*, 6); (at portion of the project it
"standing" to maintain this ac2) that petitioners have
that the only rights petitioners tion despite the contention
at will (*Fordham's Br.*, 17-18; possess is that of tenants
that if Fordham's participatic *City's Br.*, 12-13); and (3)
Urban Renewal Project is unco on in the Lincoln Square
development plan is unauthoriz nstitutional, the entire re
ed and void.

ARGUMENT

(1) The City's argument tha t petitioners have conceded
that there is no prohibition exc luding Fordham *per se* from
the project, assuming Fordham to be the successful bidder
at the auction,[1] is demonstrably inaccurate. A more accu-
rate statement of petitioners' position in the Court below
was made in the brief submitted to the New York Court
of Appeals by respondent-inter venor, Webb & Knapp Lin-
coln Square Corporation, as fo llows:

> "In the early stages of this actica, plaintiffs chal-
> lenged the Lincoln Square Project solely on the ground
> that, on the facts of the present case, Fordham would
> receive a subsidy by participating in the Project.
> (Hereinafter, this ground is referred to as 'plaintiffs'
> original position.') This is the position taken in the
> affidavit submitted in support of plaintiffs' motion for
> a preliminary injunction, which avers that '[t]he
> gravamen of the complaint is based on the sponsorship
> by Fordham University of a portion of the redevelop-
> ment plan for Lincoln Square, support and subsidy to a
> such sponsorship gives aid titution * * *. The above-
> religious educational insti that the Lincoln Square Ur-
> stated facts make it clear llegal . . .' [R. 25-26, 32-36].
> ban Renewal Project is ill on taken in the affidavit sub-
> Similarly, it is the positio ntiffs' cross-motion for sum-
> mitted in support of plain vers that '[t]hus the issue is
> mary judgment, which avc facts before the Court, and
> limited to the particular f ts is *sui generis*, no rule of
> because this state of facts

[1] *City's Br.*, 5-6.

general exclusion results and speculative consequences are irrelevant' [R. 154-155]. In the later stages of this action, plaintiffs, without abandoning their original position (Appellate Division brief, pp. 23-27; brief in this Court, pp. 25-34), challenged the Lincoln Square Project on the additional ground that no sectarian institution may be a Title I redeveloper since every Title I participant receives a subsidy by its participation. (Hereinafter, this ground is referred to as 'plaintiffs' expanded position.') Apparently, plaintiffs reached their expanded position after the decision of Special Term. Plaintiffs' affidavit in support of their cross-motion at Special Term averred that '[t]here are many ways in which a sectarian institution can properly and legally be included within a neighborhood or community being redeveloped pursuant to Title I of the National Housing Act' [R. 154]. And plaintiffs' attorney, in his final communication to Special Term before its decision, stated: 'We have heretofore conceded that there could conceivably be a state of facts under which Fordham could legally participate in a Title I project, for there is no legal prohibition *per se* which prevents government from dealing with religious institutions' (letter, dated December 19, 1957, not printed in Record on Appeal). However, in their Appellate Division brief, pp. 11-12, plaintiffs stated that, while '[i]n appellants' view, the real issue in this case is based on the undisputed facts concerning the participation of Fordham University in the Lincoln Square Urban Renewal Project * * * [g]iving the broadest possible scope to appellants' position, the issue may be whether under any state of facts a sectarian institution is barred from participation as a Title I *redeveloper*. If the Court deems resolution of that issue necessary and essential to the disposition of the instant appeal, then appellants' position is that constitutional prohibitions interdict such participation.' This position seems the burden of Point IV of their brief in this Court as well." [Brief for Respondent Webb & Knapp (N.Y. Ct. of Appeals), pp. 4-6.][2]

Moreover, the suggestion that we have conceded before this Court "that a religious institution would not be con-

[2] The numerals in brackets are "folio" numeral references transposed to reflect the pages of the record on which they appear.

stitutionally barred from participating in the plan if it paid 'full acquisition cost * * * of that portion of the project it obtains,' " *City's Br.*, 6, assumes too much. We have previously said that the purpose of "Title I" was to *subsidize* and encourage private enterprise to clear and redevelop slum areas, and that while the expenditure of Federal and municipal funds and the use of municipality's power of eminent domain to accomplish slum clearance and redevelopment is unquestionably in the public interest, implicit in these expenditures, as well as in the power of eminent domain, is the subsidy and benefit which private redevelopers receive as a result of Federal and state action. *Pet.*, 13-14. Hence, we have posed a question which in our view requires an accommodation of the legitimate powers of the Congress and of the legislative bodies of the various states and cities in attacking the problem of slum clearance on the one hand, with the constitutional principles establishing "a wall of separation between church and state" on the other. *Pet.*, 17. This accommodation of competing, but not necessarily conflicting interests will be made by this Court, not by petitioners' counsel. Thus, while we suggest that that accommodation be made in this case by holding that a religious institution may not participate in an urban renewal redevelopment project unless it pays the full acquisition cost of that portion of the project it obtains, *Pet.*, 17, nevertheless, in the delicate balancing process between the First Amendment prohibition and the legitimate powers of the Federal and municipal governments this Court will undoubtedly weigh not not only the expenditure of Federal and municipal funds, but also the use of the municipality's power of eminent domain.

So much appears from the legislative history of "Title I" itself. Indeed, in the five years immediately preceding the passage of the Act, substantial evidence had been obtained that at the root of the problem of slum clearance was the high price required to be paid for blighted or deteriorated land in central city areas. And it was this

evidence which emphasized the necessity for Federal subsidy.

> "The testimony presented during the hearings on the bill, as well as that presented in previous congressional investigations during the past 4 years, makes it clear that the high prices commanded by land in the central areas of cities, even when those areas are blighted or deteriorated, are at the heart of the slum-clearance problem. It emphasizes the necessity for Federal aid if a real start is ever to be made in the solution of this problem. These high prices for slum land, particularly in relation to the prices at which builders can acquire outlying sites, have effectively barred the purchase and the redevelopment of slum sites by private enterprise on anything but the most piecemeal and sporadic basis. *This barrier of high price has been greatly augmented by the difficulties, which for private operators are usually insuperable, of assembling large enough tracts in close-in areas to permit an economical scale of redevelopment operations.*" *S. Rep. No. 84 on S. 1070*, 81st Cong., 1st Sess., 10-11 (1949).[3] (Emphasis supplied.)

(2) Petitioners have "standing" to maintain this action, for while they are not real property owners—merely residential and business tenants, they are directly and immediately affected by the action which they challenged as a violation of the First and Fourteenth Amendments, *i.e.*, the action of the Board of Estimate of the City of New York on November 26, 1957, (a) approving the Lincoln

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[3] The subsidy feature of the law was further illuminated by Senator Douglas, a member of the Senate Banking and Currency Committee, in explaining the statute on the Senate floor. "It is probable that the major portion of the land which will thus be cleared for redevelopment will be sold to private parties. As I have pointed out, however, the resale price of this land to private industry will necessarily, in almost every case, be less than the price which the redevelopment authority originally paid for it. There will be a loss on the resale, due to the fact that the use of the land for residential purposes will be less than its present slum value. * * * *The Federal Government will shoulder this write-down loss by a total grant of $500,000,000 and hence will give a subsidy to private industry.*" *95 Cong. Rec. 4734*, April 14, 1949. (Emphasis supplied.)

Square Urban Renewal Project Plan, (b) approving the project redevelopment contracts, including the one with Fordham University, (c) authorizing the acquisition of the project area by condemnation, and (d) authorizing the sale of the project are in accordance with said plan (R. 20-22, 29, 37-41). Under the decision of the New York Court of Appeals which upheld the City's challenged action, and in order to make way for a new campus for Fordham University—a Roman Catholic institution, petitioners will be required either to vacate their respective homes and premises or to lose their respective businesses (R. 18-20).

In *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, this Court held that a litigant had "standing" to assert a cause of action for improper interference with an advantageous relationship, despite the fact that it was "terminable at will." *Id.*, at pp. 251-252. In *Truax* v. *Raich*, 239 U.S. 33, an alien employee whose employment was terminable at will, was held to have "standing" to challenge a State law requiring his employer to discharge all but a specified proportion of alien employees. *Id.*, at pp. 38-39. And in *Rudder* v. *United States* (C.A. D.C.), 226 F. 2d 51, month-to-month tenants in a low-cost housing development were held to have sufficient "standing" to challenge the constitutionality of the Gwinn Amendment to the Housing Act of 1937, 66 Stat. 403, 42 U.S.C. § 1411c. *Id.*, at p. 53. Thus, while the act of condemnation on February 28, 1958, subsequent to the institution of suit, may have cut-off petitioners' rights of possession by vesting title to the project area in the City (petitioners remaining in the premises as "tenants at will"), even the New York Court of Appeals recognized that:

> "Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action at least as praying for a declaratory judgment." (*Pet.*, Appendix "B", at p. 37.)

Accordingly, it is apparent that petitioners' "standing" is at least as good as that of the appellant in *McCollum* v. *Board of Education*, 333 U.S. 203, at p. 206.

Allied-City Wide Co., Inc. v. *Cole* (C.A. D.C.), 230 F. 2d 827, cited both by the City[4] and Fordham[5] lends no support to respondents' argument. In the *Allied-City Wide* case the Court of Appeals held that plaintiff had no "standing" to maintain the suit because the challenged action of the Federal Government in giving funds to the City for an urban renewal redevelopment project did not affect the plaintiff with sufficient "directness." See, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 480-481. Here, the action of the City attacked as unconstitutional, is the foundation upon which the subsequent act of condemnation was based. So it is no answer for the City or Fordham to say that the act of condemnation cuts-off petitioners' "standing." See, *Parker* v. *Fleming*, 329 U.S. 531, where this Court said:

> "We cannot say that tenants who are about to be evicted from their apartments on account of the order are not 'subject to' it. We are persuaded that these tenants would be required to act by the issuance of the certificate. They would either have to move themselves and their possessions to another abode, which might be difficult or impossible to obtain, or undertake defense of eviction proceedings in the State courts, which proceedings, but for the certificate, would have been barred by the regulation promulgated under the Act. For the same reason, it seems apparent that they would be immediately, substantially, and adversely affected by the order." *Id.*, at p. 538.

While the *Parker* case involved an interpretation of Section 204(a) of the Emergency Price Control Act, 50 U.S.C., Appendix, § 904(a), the force of its reasoning is no less valid here. See also, *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, at pp. 140-141, 151-156, and *Pierce* v. *Society of Sisters, etc.*, 268 U.S. 510, 535-536.

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[4] *City's Br.*, 17.

[5] *Fordham's Br.*, 18.

(3) We think it clear that if Fordham's participation in the Lincoln Square Urban Renewal Project is unconstitutional the entire redevelopment plan is unauthorized and void. However, we anticipate that respondent-intervenor Lincoln Center for the Performing Arts, Inc. will take the position that the project is severable, *i.e.*, that the acquisition and sale of the project area does not depend upon the existence of an Urban Renewal Plan since the terms of the deeds of sale required the purchasers to meet the statutory requirements of clearance and replanning without the existence of a plan. Nevertheless, the attempted distinction between the Lincoln Square Urban Renewal Plan and the requirements of clearance and replanning of the Lincoln Square Project area is specious. The statutory requirements of clearance and replanning can be met only by a specified plan. Indeed, the "prior consent of the [New York] City Planning Commission," which under Section 72-k of the New York General Municipal Law was required prior to the City's acquisition of the project area,[6] was given by its approval of the Urban Renewal Plan (R. 29). In this latter connection, the Court will note that the City Planning Commission found that acquisition of the entire area was "necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area." The statutory finding could have been made only for the area considered as a whole since certain parts of it are not only standard, but above standard. Thus, in *Kaskel* v. *Impelliteri*, 306 N.Y. 73, the New York Court of Appeals emphasized that a finding by the New York City Planning Commission that an area is substandard and insanitary is a determination made for the area as a whole. *Id.*, at p. 78. Accordingly, if this Court should consider the project as being severable, it would, in effect, be making its own determination as to the substandard character of the remaining portion of the project area. And in *Berman* v. *Parker*, 348 U.S. 26, this Court held that it would not usurp the

[6] *Pet.*, Appendix "A", at pp. 34-35.

statutory duties delegated to the National Capital Planning Commission. *Id.*, at pp. 33-36. Therefore, if Fordham's participation in the project is unconstitutional, we think that the entire redevelopment plan is unauthorized and void.[7]

CONCLUSION

We have not replied to respondents' argument that the record presents an ordinary contractual transaction between Fordham and the City of New York based upon what the New York Court of Appeals found to be "an exchange of considerations and not a gift or subsidy" (*Pet.*, Appendix "B", at p. 39).[8] That argument has been fully dealt with in the petition for certiorari, at pp. 11-19. Nevertheless, it is obvious that the answers to the fundamental constitutional questions posed by this case will not be found in the law of contracts. Even respondents would agree that the sale of Manhattan Island to Fordham University for twenty-four dollars would be a violation of the constitutional principle "erecting a wall of separation between church and state."

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[7] Petitioners, who either reside or do business in the area which was condemned by the City and then sold to Fordham University, nevertheless sue on behalf of "all others similarly situated," *i.e.*, in the Lincoln Square Urban Renewal Project area. (R. 18-22).

[8] *City's Br.*, 7, 9-10; *Fordham's Br.*, 10-13.